STATE OF ILLINOIS

BEFORE THE ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	:	
	:	
Petition for Arbitration Pursuant to Section	:	
252(b) of the Communications Act of 1934,	:	04-0428
as amended by the Telecommunications	:	
Act of 1996, and the Applicable State Laws	:	
for Rates, Terms, and Conditions of	:	
Interconnection with Illinois Bell Telephone	:	
Company (SBC Illinois).		

Attachment 1 to Level 3 Communications, LLC's Initial Brief

POSITION STATEMENTS OF
LEVEL 3 COMMUNICATIONS, LLC

While the Initial Brief and Position Statements were being drafted, the Parties continued their negotiations in an attempt to settle additional issues. If those negotiations prove successful, the Parties will inform the Panel as quickly as possible.

NETWORK INTERCONNECTION METHODS ISSUES

NIM Issue 1

LEVEL 3 POSITION

Level 3 demonstrated through testimony and evidence adduced during the hearing that the parties can exchange differently-rated traffic over the same set of trunk groups. Consistent with its positions detailed in ITR Issue 11 below, no legal, technical or economic barriers exist that prevent the parties from achieving this arrangement. Moreover, SBC's insistence that Level 3 construct a second set of trunks solely for the purpose of exchanging traffic to which different rate schemes might apply pursuant to state or federal tariff accelerates tandem exhaust. Moreover, SBC's inclusion of the term "interexchange" obfuscates the scope of the parties interconnection rights, which are defined by law. SBC's term, "interexchange", however, is neither defined within the Act nor in relevant FCC Rules.[1] Moreover, the parties currently exchange "interexchange" traffic over their interconnection trunks because both "locally" rated traffic (i.e. within a single local exchange area) and "interexchange" traffic (i.e. "intraLATA toll) are exchanged over existing interconnection trunks, which rights are defined by Section 251(c)(2)(A).[2] Thus, the term "interexchange" is ambiguous and open to misinterpretation and misuse. It is an industry and business term, but not a term of legal definition. Accordingly, this Commission must prohibit SBC from deliberately creating ambiguity where none need exist.

NIM Issue 2

ISSUE RESOLVED

NIM Issue 3

ISSUE RESOLVED

NIM Issue 4

ISSUE RESOLVED

[1] *See* 47 C.F.R. § 51.5.

[2] Under Section 251(c)(2)(A), carriers may interconnect for the purpose of exchange telephone exchange services (47 U.S.C. § 154(47)) or exchange access services (47 U.S.C. § 154(16)). Neither term is limited to or prohibits exchange of "interexchange" services.

NIM Issue 5

LEVEL 3 POSITION

Both Parties agree that it is technically feasible for Level 3 to exchange all forms of traffic with SBC at a single POI within each LATA where Level 3 interconnects.[3] In fact, SBC does not argue that it is technically incapable of exchanging traffic at a single POI. Rather, SBC explicitly acknowledges that Level 3 can select a single POI - but instead SBC argues that such interconnection is costly.[4] As such, the Commission should reject SBC's proposed limitation on the types of traffic to be exchanged between the parties, and adopt Level 3's language in NIM Appendix Section 2.5 that makes clear that the trunk groups do not limit the exchange of traffic to just local traffic.

NIM Issue 6

Level 3 and SBC both agree that a Point of Interconnection ("POI") is the location where two carriers physically connect their networks for the purpose of exchanging traffic. Importantly, both Parties seem to agree that it is technically feasible for Level 3 to exchange all forms of traffic with SBC at a single POI in each SBC LATA where Level 3 does business.[5] SBC does not argue that it is technically infeasible to exchange traffic at a single POI - and, in fact explicitly acknowledges that Level 3 can select a single POI - but instead argues that such interconnection is costly.

Each company should be fully responsible for transport of its originated traffic to the POI. Even SBC admits the POI is the "financial demarcation point for [the] facilities" and "[e]ach company is responsible for its own facilities on its respective side of the POI", but SBC's interconnection proposals contradict these statements.[6] In support of its position, Level 3 points to 47 C.F.R. 51.703(b), which states:

> A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

This rule prohibits carriers from shifting costs of transporting traffic to the POI to other carriers. The FCC recognized, when it codified Rule 703(b), that the financial responsibilities for interconnection for the exchange of traffic should be borne solely by each carrier on its side of the POI.

---

[3] The parties have settled NIM issues 2, 3, and 4, which related to where Level 3 establishes POIs within SBC territories. According to that agreement, whenever traffic between Level 3 and an SBC end office or tandem reaches 24 DS-1s for 3 consecutive months, Level 3 will establish direct trunk groups to such end office or tandem. SBC found this arrangement desirable in part because it keeps traffic off of their tandems and frees up tandem ports and switching functionality.

[4] Albright Direct, pp. 24-26; *See also, Id*. p.12 (stating "the issue is *not* whether Level 3 can interconnect at a single POI or whether Level 3 can select the location of the POI").

[5] Wilson Direct, pp. 9-10; Hunt Direct, p. 37.

[6] Albright Direct, p. 17.

Level 3's positions are also consistent with the 2002 *FCC Virginia Arbitration Order*[7], wherein the FCC's Wireline Competition Bureau, serving in its duty to enforce the FCC's regulations, applied Rule 703(b) with respect to a CLEC's right to select a POI and the obligation of the originating carrier to pay for its transport costs to the POI. In that case, the Bureau found that AT&T's language providing AT&T (not the ILEC) has the right to designate a single POI per LATA at any technically feasible point and that the ILEC must be financially responsible for the transport of its traffic to that POI was more consistent with 47 C.F.R. 51.703(b) (which prohibits charging a CLEC for traffic originating on the ILECs network), and 47 C.F.R. 51.305(a)(2) (which allows a CLEC to connect at any technically feasible point).[8] The parallels between that proceeding and the one before this Commission are startling. The *Virginia Arbitration Order* supports its position that the FCC's rules require SBC, the ILEC, to bear the technical and financial responsibility to transport its traffic to the Level 3 POI.

Level 3's position is also supported by several federal court cases applying Rule 703(b), including a Fourth Circuit case that recently addressed this issue and held that "*Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions*."[9] Second, Level 3 relies on an order from the Western District of Texas in the Fifth Circuit, where the Court held that SBC's affiliated ILEC in Texas, SWBT, could not impose any sort of transport costs for transporting its originated traffic to AT&T's POI. The Court held that

> AT&T has the statutory right under the Act to select the location of a technically feasible point of interconnection, and that the regulations of the federal Communications Commission ('FCC"), including in particular *47 C.F.R. § 51-703(b) prohibits SWBT from imposing charges for delivering its "local" traffic originating on its network to the point of interconnection selected by AT&T even when that point is outside of a local calling area of SWBT*.[10]

On appeal of that Order, the Fifth Circuit Court of Appeals upheld the District Court's decision, relying on the FCC's *Virginia Arbitration Order* to confirm that

> a CLEC is permitted to choose to interconnect with ILECs at any technically feasible point, including a single-LATA-POI; and . . . *an ILEC is prohibited from imposing charges for delivering its local traffic to a POI outside the ILEC's local calling area*.[11]

---

[7] *In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039 (2002) ("*FCC Virginia Arbitration Order*").

[8] *FCC Virginia Arbitration Order*, ¶¶ 52, 53.

[9] *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc*., 352 F.3d 872, 881 (4th Cir. 2003).

[10] *Southwestern Bell Telephone Company v. Texas Public Utility Comm'n, et al.*, 2002 U.S. Dist. Lexis 26002, CA No. MO-01-CA-045 (W.D. Tex. Dec. 19, 2002) (emphasis added).

[11] *Southwestern Bell Telephone Co.*, 348 F.3d at 485. (citing *Virginia Arbitration Order*, 17 FCC Rcd 27,039 (2002)).

For Level 3, these FCC and federal court cases support Level 3's argument that it is entitled to interconnect with SBC at a single POI per LATA and that SBC cannot force Level 3 to compensate SBC for transporting SBC's traffic to Level 3's POI. Level 3 also notes that not a single one of these authorities have carved out mass calling and Meet-Point trunk groups from their findings. Thus, SBC is attempting to create new law on the subject.

NIM Issue 7

LEVEL 3 POSITION

Level 3 notes that this issue is largely addressed below in PC Issue 1 and VC Issue 1. For the reasons detailed therein, SBC's refusal to include the reference to "Applicable Law" could serve as a waiver of Level 3's rights to collocate in a new manner if allowed under the Act, FCC orders and regulations, as well as any independent rights pursuant to state law and SBC's own tariffs (i.e., the "Applicable Law"). Each source of additional law is subject to revisions outside the scope of the interconnection agreement process, and Level 3 should not be precluded from taking advantage of these rights. There is no harm in incorporating a reference to Applicable Law. Level 3 should be entitled to purchase services at rates, terms and conditions that SBC may publicly offer to any other carrier. As such, Level 3's language in NIM Appendix Sections 3.1.1 and 3.2.1 is consistent with these goals and should be adopted by the Commission.

NIM Issue 8

LEVEL 3 POSITION

Level 3 language in NIM Appendix Section 3.3.1 clarifies that it would have the ability to lease facilities from SBC on terms and conditions no less favorable than SBC provides itself or any other carrier. SBC contends it is not obligated to provide interconnection facilities on the CLEC side of the POI, including lease facilities. As a result, SBC's opinion is that Level 3's language in NIM Appendix Section 3.3.1 is not subject to arbitration.[12] In response, Level 3 notes that Section 251(c)(2)(C) imposes a duty on every ILEC, including SBC, to provide for interconnection with the local exchange carrier's network "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or an other party to which the carrier provides interconnection". Section 251(c)(2)(D) requires that SBC provide this interconnection at "rates, terms and conditions that are just, reasonable, and nondiscriminatory."

Level 3 proposes that the agreement clarify that SBC must provide lease facilities on terms no less favorable than what it provides to itself or any other carrier. In other words, Level 3's language clarifies that the facilities must be provided in a nondiscriminatory manner. Such terms are consistent with the mandates of Section 251(c)(2)(C) and (D).

ISSUES WITH INTERCONNECTION TRUNKING APPENDIX

ITR Issue 1

LEVEL 3 POSITION

[12] *See*, NIM DPL, Issue NIM 8, SBC Position/Support.

Initially, Level 3 notes that, as a leading facilities-based provider of telecommunications services, it has constructed a nationwide advanced fiber optic backbone network. Over the course of developing its network, where Level 3 interconnects with ILECs like SBC, Level 3 has constructed or paid for expensive co-carrier facilities capable of carrying all forms of traffic (*i.e.,* interLATA, Local and IntraLATA), and SBC and Level 3 both continually cooperate in the proper capacity management for these facilities.[13] As Level 3 witness Mr. Hunt explains, Level 3 and SBC have, consistent with their interconnection agreements and industry standards, exchanged traffic over trunk groups that are not dedicated to a particular type of call, and have done so since the beginning of their exchange of traffic.[14] In other words, Level 3 has built its current network relying on trunks that carry a mix of traffic, basing the size and capacity of its trunking arrangements with SBC on the total amount of traffic exchanged between the parties. Importantly, even SBC witness Albright admits that combined traffic is currently exchanged over the same trunk groups today.[15]

According to Level 3, SBC's proposed use of the phrase "Section 251(b)(5) Traffic, ISP Bound Traffic, IntraLATA toll [and] InterLATA 'meet point' traffic" mischaracterizes the types of traffic that is exchanged between the Parties and is not consistent with the clear language of the Act.

SBC unlawfully restricts the scope of traffic to which Section 251(b)(5) compensation regimes apply. Under the Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located. By its very terms, Section 251(b)(5) applies to "the transport and termination of telecommunications."

To this clear definition, SBC imposes a geographic standard occurs nowhere within Section 251, nor within any definitions relevant to Section 251 (i.e. neither the definition of "telephone exchange service" "exchange access service" or "telecommunications" contain such restrictions. Ironically, the one term that SBC argues is relevant to its Section 251 obligations "LATA" is defined with some reference to geography, which geographic boundaries are no longer legal barriers to the types of services SBC is permitted to provide). SBC's attempts to single-handedly rewrite sections of Title 47 of the United States Code in a bilateral interconnection negotiation, where delay often serves SBC's purposes is, on its face, entirely inappropriate. Here, SBC's designs are targeted to achieving results in bilateral interconnection negotiations they have failed to achieve in their arguments and appeals of the FCC's deliberations in the *ISP Remand Order* and the FCC's investigations regarding IP Enabled services.[16] Level 3 proposes that it would be best if the parties and this Commission wait until the FCC has released its orders, which is expected in the very near future. As such, the Commission must reject SBC's attempts at preempting the FCC's deliberations in the upcoming *ISP Remand Order*, and reject SBC's language in IC Appendix Section 1.2. Rather, Level 3's use of the term "Telecommunications Service" as more consistent with Section 251.

[13] Petition, ¶ 36.

[14] Hunt Direct, p. 44.

[15] Albright Direct, p. 42-43.

[16] *ISP Remand Order.*

ITR Issue 2

LEVEL 3 POSITION

For the purposes of this interconnection agreement, "transit traffic" is traffic that is originated by a third party local service provider (such as an Independent Phone Company (ICO), Cellular Mobile Telephone System (CMTS) or a CLEC (other than Level 3) and is transported over the facilities of SBC for termination by Level 3, or that is originated by Level 3 and is transported over the facilities of SBC for termination by a third party local service provider.[17] While carriers such as Level 3 have direct trunks to certain third party providers, only SBC has ubiquitous interconnection trunks to every third-party provider and exchanges traffic with all third party providers on a regular basis.[18] If a Level 3 customer calls the customer of a CLEC that is not directly interconnected with Level 3, SBC acts as a "hub" and is paid transit rates to carry the traffic between the carriers.[19]

Since the adoption of the Act, SBC has provided transit service pursuant to interconnection arrangements.[20] The existing SBC and Level 3 interconnection agreement provides a rate for the traffic.[21] In addition, the agreement protects SBC by establishing a traffic threshold at which point Level 3 must establish direct interconnection with the third party carrier.[22] However, during negotiations SBC stated that it would no longer carry Level 3's transit traffic under the terms of an interconnection agreement subject to the Act.[23]

SBC asserts that Section 251(c)(2) of the Act does not obligate SBC to provide transit services as form of interconnection, regardless of the SBC's acknowledged requirement to provide direct and indirect interconnection with its network.[24] SBC contends that transit is not an interconnection service because indirect interconnection must entail more than the mere transport of traffic, *i.e.*, there must be an exchange of traffic that originates or terminates on SBC's network.[25] SBC states that it will continue to offer a transit service for carriers, but the terms of the service will be contained in a separate commercial agreement outside the scope of a Section 251/252 negotiations and Commission determinations.[26]

---

[17] Wilson Direct, p. 24; Hunt Direct, p. 51. SBC states in its testimony that transit traffic that runs from Level 3 to a third party provider is not at issue here. *See* McPhee Direct at p. 20. Level 3 does not agree. Level 3's concerns and proposal regarding transit traffic apply regardless of the direction of the traffic.

[18] Hunt Direct, p. 51; Wilson Direct, p. 25.

[19] Hunt Direct, p. 51.

[20] Hunt Direct, p. 51.

[21] Hunt Direct, p. 51.

[22] Hunt Direct, p. 51, *citing* Current SBC-Level 3 Interconnection Agreement, Appendix Interconnection Trunking Requirements, Sections 4.2.1, 4.2.2, Appendix Reciprocal Compensation, Section 6.

[23] Hunt Direct, p. 51.

[24] McPhee Direct, p. 22-23.

[25] McPhee Direct, pp. 22-23.

[26] McPhee Direct, pp. 24.

Level 3 argues that SBC has a legal obligation under Section 251 of the Act to provide transit service to Level 3 as an inherent aspect of interconnection. The Commission should follow the lead of the FCC's Wireline Competition Bureau, which expressly directed the parties to include language in the interconnection agreement that includes ***in a Section 251 interconnection agreement*** that the ILEC must provide transit services to the CLECs.[27] SBC cannot reasonably assert that Section 251 does not require SBC to provide transit services to Level 3. The Bureau has provided this Commission with a roadmap of how to address this issue of Transit Traffic, and the Commission should follow suit.

Furthermore, as SBC admits, Section 251(a) imposes on all telecommunications carriers the duty to interconnect with the facilities and equipment of other telecommunications carriers either "directly or indirectly." Nothing in the language in Section 251(a) limits SBC's obligations under this section to traffic that originates or terminates on SBC's network as SBC suggests.[28] As such, transit service provides meaning to the requirement under Section 251 that SBC interconnect indirectly with other carriers.

Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers "for the termination and routing of telephone exchange service and exchange access." Again, nothing in Section 251(c)(2) limits SBC's interconnection duty to the exchange of traffic between SBC and Level 3.[29] Rather, Section 251(c)(2) demands the parties exchange all traffic regardless of origination or termination. The obligation to exchange all traffic, regardless of origination or termination, is fundamental to the transparent, seamless, un-Balkanized network which lies at the core of the goals of the Act. It is the recognition inherent in the Act that artificial barriers to the ubiquitous exchange of traffic – unjustified by either network efficiency or economic necessity – which dictates the continuation of the transit traffic relationship already established between Level 3 and SBC. SBC must continue to provide transit traffic services to Level 3 so that Level 3 – and all carriers - may exchange transit traffic with other third parties that are also connected to SBC.

Alternatively, should SBC's arguments fail to sway the Commission and the Commission includes transit services in the agreement, SBC urges the Commission to adopt its proposed transit language, which introduces a bifurcated rating system for Transit Traffic. SBC proposes the current Transit Traffic Rate for those minutes up to a certain threshold of minutes per month throughout the state, and, for any minutes over that threshold, Level 3 would pay a substantially higher Transit Traffic Rate.

According to SBC, this would not result in a difference in rate until the threshold is met. However, the SBC scheme defies common sense. Generally, when volume increases on a product, network economics would result in a decrease in the price per unit. SBC's proposed bifurcated rating proposal reflects a scheme where the price goes up with the increased volume which directly contravenes basic rules of economics. SBC's ability to increase the price reflects

[27] *FCC Virginia Arbitration Order*, ¶¶ 115-120.

[28] McPhee Direct, p. 22-23.

[29] McPhee Direct, p. 22-23.

SBC's market power for providing transit services and is not linked to any evidence that shows SBC's costs actually increase..

Counter to SBC's assertions that its proposal would not result in a difference in rate until the threshold is met, SBC's proposals actually result in economically forcing Level 3 to direct connect to other carriers at a threshold far lower than the 24 trunks that is included in the agreed upon terms of the Agreement. The 24 trunk threshold when applied to the SBC bifurcated rate proposal would not have any meaning when the realities of the network operations are taken into account.

For instance, if the Commission were to calculate the number of minutes Level 3's customers in the state are using a phone in any given minute (a calculation resulting in what is referred to as an "ehrlang") to calculate the number of trunks Level 3 would need to connect calls between two switches or two parties, the result would be about 166 ehrlangs on average, utilizing approximately 6 to 10 trunks to reach the given 8 million minute threshold – voiding the remaining 14-18 trunks under the 24 trunk threshold.[30] Thus, SBC's proposal forces Level 3 to pay the higher Transit Rate (i.e., on more than 8 million minutes) for traffic on the remaining 14-18 trunks in order to carry traffic that even SBC acknowledges should not require direct connection. This would economically force Level 3, and every other CLEC in the state, to direct connect far more often, raising their costs by orders of magnitude, for no network efficiency reason. Rights of way and poles would literally be crammed and over burdened with wires to effect the SBC scheme- should Level 3 or a CLEC not succumb to SBC's dictated rate structure. In light of these facts, SBC's proposal to institute an arbitrary and unsupportable bifurcated rate structure for Transit Traffic must be rejected. In actuality, SBC's proposal is nothing but a back door attempt to force Level 3 to either pay unjustified rates or direct connect to other carriers at a much lower trunk threshold than would otherwise be required under the terms of the Agreement.

Further, in addition to the *FCC Virginia Arbitration Order* discussed above, Level 3 points the Commission to a number of other state commission orders imposing transit traffic terms and conditions within a Section 251/252 interconnection agreement. [31]

---

[30] For instance, in any given minute Level 3 has ten of its customers using the network at that time, that minute result in about 10 ehrlangs.

[31] *Final Arbitrators Report*, In the Matter of Verizon California Inc. (U-1002-C) Petition for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. (U5266C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, Application 02-06-024, at 17-18 (2003) ("*Verizon California*"); *In the Matter of the Petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with MCIMetro Access Transmission Services, LLC, Pursuant to Section 252(b) of the Telecommunications Act of 1996*, MPSC Case No. U-13758, Opinion and Order, Aug 18, 2003 ("*MCIMetro Michigan Arbitration Order*"); *In the Matter of the Application of AT&T Communications of Michigan, Inc. and TCG Detroit for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Michigan pursuant to 47 USC 252(b)*, Case No. U-12465, Opinion and Order, Nov 20, 2000; *In the Matter of the Application of Sprint Communications Company, L.P. for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan*, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan 15, 1997; Opinion and Order, *In the matter of the petition of Michigan Bell Telephone Company d/b/a SBC Michigan for arbitration of interconnection rates, terms, conditions, and related arrangements with MCIMetro Access Termination Services, LLC, pursuant to Section 252b of the Telecommunications Act of 1996*, MPSC Case No. U-13758, p. 45-46 (2003); *Re MediaOne Telecommunications of*

In light of the obligations imposed by Section 251 of the Act, the FCC's Virginia Arbitration Order, and the various state commission orders cited herein, the Commission should adopt its rationale on Transit Traffic. With specific application to each of the remaining Transit Traffic issues, Level 3 states as follows:

This Commission should follow the FCC's Wireline Competition Bureau's lead in this pivotal issue. The Commission must find that transit terms are appropriate to incorporate into the Agreement. For the reasons stated above, the Commission should adopt Level 3's language in ITR Appendix Section 3.3, and reject SBC's attempt to limit the exchange of traffic to that "traffic between each Party's End Users only."

ITR Issue 3

LEVEL 3 POSITION

Level 3 has proposed language inserting the phrase "or as permitted by Applicable Law" into ITR Appendix Section 3.6, to which SBC objects. Level 3 argues that Agreement should acknowledge that there may be legislative, administrative or court proceedings that will impact the interconnection methods by which the two-way trunks are implemented, in addition to those specified in the Appendix NIM. Failure to specify the existence of the Applicable Law will result in a possible waiver of both Parties' rights provided under those proceedings. The failure to include such terms would expose Level 3 to the risk that it will not be able to avail itself of the legal rights it may have that are developed in the Applicable Law. There is no reason why, for instance, Level 3 should not be able to take advantage of a voluntary tariff offering SBC may make in the future just because there is not language in the Agreement that would account for such occurrence.

SBC claims that Level 3's language would allow it to unilaterally designate any method of interconnection and use it without any terms and conditions in the ICA. What SBC fails to account for is the fact that such terms and conditions would be present in whatever the source of the Applicable Law – i.e., either in SBC's tariff, our orders, or a judicial order. Thus, Level 3 would not be unilaterally designating any method of interconnection, it would be exercising its rights under the law. If Level 3's language is not adopted, then it would be unfairly prohibited form taking advantage of that voluntary tariff offereing or order, while its competitors would be able to avail themselves of the offering.

In order to treat Level 3 in a like manner as all other competitors, Level 3's proposed language in ITR Appendix Section 3.6 must be adopted.

ITR Issue 4

LEVEL 3 POSITION

Massachusetts, Inc., D.T.E. 99-42/43, D.T.E. 99-52, Massachusetts Dept. of Tele. And Energy, rel. Aug. 25, 1999; see also, Ohio Rules of the Commission RC 4901:1-6-32(C)-(D).

Level 3 is able to establish a Single Point of Interconnection in each LATA in which it serves. Under Section 251(c)(2), each CLEC, like Level 3, is authorized to establish a SPOI in each LATA. The FCC and this Commission have repeatedly held that the FCC's rules allow a CLEC to request interconnection at the technically feasible point, including the right to request a single POI in the LATA. SBC's proposed language (if adopted) would absolve itself of the responsibility to route its traffic to Level 3's POI.

As for the issue of which Party bears the financial responsibility of transporting the traffic to the POI, this issue is directly related to NIM Issue 6 above. Consistent with the Panel's determinations therein, the Panel should adopt language in ITR Appendix Section 4.2 that corresponds.

ITR Issue 5

LEVEL 3 POSITION

Level 3's language in ITR Appendix Section 4.3 allows Level 3 to establish direct trunking with other carriers once the level of traffic reaches a DS1 level of volume on a consistent basis. SBC appears to agree that the DS1 threshold, or 24 DS0 trunks, is the appropriate level. This threshold is also consistent with the FCC Wireline Competition Bureau's findings in the *FCC Virginia Arbitration Order*, which used a DS1 threshold to determine when the CLEC must direct connect with another carrier.[32]

It appears the only remaining dispute is the amount of time necessary for a determination that the threshold has been met. Under Level 3's ITR Appendix Section 4.3, the practical timeframe is three consecutive months. This will allow for a realistic demonstration over a reasonable period of time to show that the traffic is consistent and network and cost justified a direct connection.

In contrast, SBC proposes no time limit. Under SBC's proposal, SBC could demand a direct connection at any point in time where there may be a DS1's worth of traffic – even if that traffic lasts only a minute, and occurs only once. This is hardly a sound proposal, and results in future disputes over the appropriateness of allowing a single snapshot in time serve as the basis for direct connecting with a carrier.

It is a far sounder policy for this Commission to adopt Level 3's language that allows for a reasonable period of time when the threshold is satisfied to warrant the investment and expense of establishing direct interconnection with another carrier. As such, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.

ITR Issue 6

LEVEL 3 POSITION

As stated in ITR Issue 2 above, the Commission should include transit terms and conditions in the agreement that will impose on Level 3 the obligation to direct connect with any

[32] *FCC Virginia Arbitration Order*, ¶ 115, 117-118.

other carrier with whom it exchanges the requisite amount of traffic. Level 3 proposes language in ITR Appendix Section 4.3.1 that imposes the obligation, to direct connect when traffic exceeds one DS1's worth of traffic for three consecutive months on SBC as well. In other words, as SBC will also have traffic that it needs to exchange with other carriers, Level 3's language makes the direct connection terms reciprocal on Level 3 and SBC. To Level 3, the fact that there is even a dispute on this topic speaks volumes. It is only fair and proper to impose on each Party the same obligations to direct connect upon satisfying the proposed threshold. As such, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.1.

ITR Issue 7

This issue is specific to Connecticut only, and need not be addressed by this Commission.

ITR Issue 8

LEVEL 3 POSITION

The Agreement should contain terms and conditions governing Transit Traffic, including terms that govern the transition period between the SBC-provided transit services and when Level 3 direct connects with the other carrier. Level 3's language is necessary to clarify the Parties' obligation to continue to provide transit services for the limited period of time it takes to establish the arrangement necessary with the other carriers for the exchange of traffic. Again, Level 3's language in ITR Appendix Section 4.3.3 is reciprocal. Thus, by including these terms, both SBC and Level 3 are obligated to provide the transit service, thus ensuring that there will not be customers unable to complete calls.

Level 3's proposal to include transition terms is also consistent with the findings of the *FCC's Virginia Arbitration Order*. In that proceeding, the ILEC (Verizon) proposed language that would allow it to terminate transit services after a transition period "at its sole discretion" was not appropriate. The Wireline Competition Bureau held that such a proposal

> creates uncertainty and would be unworkable, because it puts Verizon in the position of determining whether AT&T has used "best efforts" and whether it has been unable to reach an agreement "through no fault of its own." We are thus concerned that Verizon's proposed language could lead to further disputes between the parties.[33]

As such, the Wireline Competition Bureau held that transition terms should be included in the Agreement ultimately sent to the FCC for approval. The same rationale applies here. The failure to incorporate the transition terms can only lead to future disputes over whether either Party is attempting to enter into the direct connection with the other carriers.

For these reasons, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.3.

[33] *FCC Virginia Arbitration Order*, ¶ 115.

ITR Issue 9

LEVEL 3 POSITION

The issues raised in ITR Appendix Section 4.3.4 are related to ITR Issues 1, 5, and 8 above, and Level 3's language should be adopted for the reasons stated therein. Further, Level 3's language in ITR Appendix Section 4.3.4 mandates that Level 3 must use commercially reasonable efforts to establish the direct interconnection with the other carriers when SBC notifies it that it has surpassed the threshold. The terms in question provide clarity on the obligations imposed under the Appendix, and will assist in enforcing the transition terms discussed in ITR Issue 8 above. For these reasons, the Commission should adopt Level 3's language in ITR Appendix Section 4.3.4.

ITR Issue 10

These issue are specific to the SBC Southwest states, and this Commission need not address the issues.

ITR Issue 11

LEVEL 3 POSITION

The SBC contract language prohibits the use of interconnection trunks for InterLATA traffic between SBC customers and Level 3 customers. While SBC allows Local and IntraLATA traffic on the interconnection trunks, SBC would require Level 3 to provision separate trunk groups for InterLATA traffic between SBC and Level 3 customers. This requirement would force Level 3 to provision separate trunk groups to every SBC tandem and end office where Level interconnects thus creating, over time, a second network.

There has been some confusion as to the nature of the second set of trunk groups that the SBC language would force Level 3 to create. These trunk groups have been called Feature Group D trunk groups in some contexts, but this has led to their confusion with Meet Point Trunk Groups. Meet Point Trunk Groups are trunk groups from Level 3 to IXCs that are routed through SBC tandem switches. Level 3 needs Meet Point Trunk Groups to complete calls to IXCs where Level 3 has no direct connectivity to the IXCs. Level 3 and SBC have agreed to provision separate trunk groups for Meet Point traffic to SBC tandem switches. So Meet Point Trunk groups are not the issue.

What remains in dispute is whether SBC should be permitted to require Level 3 to construct and pay for a second (duplicative) set of trunk groups according to terms, rates and conditions contained in SBC's FCC Tariff No. 1, Section 6. At the most basic level, SBC seeks to require separate trunk groups for InterLATA traffic between SBC customers and Level 3 customers. Such trunks would need to be provisioned to each SBC tandem and to each SBC end office where the traffic is greater than one DS1 equivalent. Level 3 has never provisioned trunks of this nature to SBC, so this would constitute new, unnecessary trunk groups. The sensible alternative is to allow this traffic to flow over existing interconnection trunk groups along with

local and IntraLATA traffic. This would also eliminate any argument about which trunks IP traffic should ride.[34]

Accordingly, by building out multiple interconnection trunks for traffic that is rated according to tariffs in some instances and federal law in others and paying federally tariffed rates for the privilege of building out a second expensive network that ties up SBC's tandems serves only SBC's short term pecuniary interests without regard to technical feasibility, industry practice or sound methods for handling the billing concerns SBC trumpets as justification for this expensive and technically challenged arrangement.[35]

From a network perspective, the evidence is unambiguous that, should the Commission adopt SBC's proposals on Issues 2 and 6, Level 3 will face an increase in the following:

1. The larger number of DS1s needed to carry the same amount of traffic will increase the number of facilities in use and the number of switch terminations for those facilities.

2. Increasing the number of switch terminations can cause one company or the other to demand additional switch modules, increasing the capital requirements.

3. Switches themselves can handle only a limited number of switch modules and DS1 terminations.

4. At some point, the additional trunk ports will increase the likelihood of tandem exhaust (which occurs when SBC exhausts the number of available trunk for interconnection.)

5. Likewise, fiber facilities carry a discrete number of DS1s on a given amount of lit fiber. Increasing the number of DS1s can require a company to add fiber equipment to increase capacity.[36]

Interestingly, the evidence also indicates that network impact of SBC's proposals might outweigh or at least decrease the positive financial impact from revenues derived from forcing Level 3 to pay for its massive interconnection architecture at retail federally tariffed access rates (which include both trunk and facilities charges). Specifically, the evidence indicates that if Level 3, and any other interconnecting CLEC, is required to duplicate facilities unnecessarily, SBC would be required to duplicate trunk groups at each and every tandem or end office where Level 3 currently has connected its interconnection infrastructure.[37] SBC, in other words, would have Level 3 (and any other CLEC) double the number of trunk groups throughout its network, which in Level 3's case doubles the number of trunk ports needed at each and every tandem and

[34] A single trunk group would carry local exchange, extended area service, intraLATA toll, interLATA toll, exchange access, IP-Enabled, ISP-Bound and other miscellaneous telecommunications traffic. Hunt Direct, p. 38.

[35] Gates Direct, p. 33-36.

[36] See, Wilson Direct, p. 20.

[37] Gates Direct, p. 34-36.

end office where Level 3 already interconnects. That effort would tie up massive numbers of trunk ports region-wide. Multiply that across all CLECs and tandems would likely exhaust very quickly, completely inhibiting CLECs from exchanging traffic with SBC.

Level 3's proposal, by contrast, is based in sound engineering principles that ensure the efficient and economic exchange of differently rated traffic based upon existing practice.[38] So in addition to saving SBC the unnecessary expense and hassles associated with increased levels of blocked calls (due to using duplicate facilities rather than a single appropriately sized one) and saving SBC and all other CLECs from accelerated tandem exhaust, Level 3 will pay SBC both the per minute charges and the additional facilities and trunk charges apportionable tariffed switched access schemes.[39] Moreover, Level 3 and SBC would continue to pay reciprocal compensation as it is today based upon their current agreement or according to federal law. As described above, Level 3 would accurately allocate these charges according to industry-standard PIU and PLU factors.[40]

As a legal matter, Section 251(c) of the Act obligates all local exchange carriers, like SBC, to provide non-discriminatory interconnection. It also applies additional obligations on incumbent LECs. Section 251 (c)(2)(B), for example, unambiguously requires that SBC provide Level 3 with interconnection "at any technically feasible point within its network." Level 3, therefore, may choose the manner in which the interconnection will take place. As a market-based competitor holding only a mere fraction of SBC's market power, Level 3 must choose the most efficient interconnection methods possible. As SBC's testimony demonstrates, the competitive telecommunications market is harsh and unforgiving.[41] Yet, here SBC insists upon an interconnection architecture that the record clearly reveals is technically infeasible (if not irresponsible).[42] It is an architecture that the parties (and carriers nationwide) already use to exchange differently rated traffic. BellSouth voluntarily agreed with Level 3 to exchange all traffic, including interLATA toll and IP Enabled Traffic, ***over a single trunk group***.[43] This point alone substantially if not completely justifies approval of Level 3's request. According to FCC Rule 51.321(c), "a previously successful method ***of obtaining interconnection*** or access to unbundled network elements at any particular premises ***or point on any incumbent LEC's network is substantial evidence that such method is technically feasible*** in the case of substantially similar network premises or points."[44]

[38] Hunt Direct, p. 45.

[39] Level 3 will pay SBC's Switched Access Charge for all traditional circuit switched phone-to-phone interLATA toll traffic. Hunt Direct, p. 45.

[40] The PLU determines the percent of traffic carried over the trunks that was local in nature and not subject to access charges. Wilson Direct, p. 21-22. Level 3 will provide SBC with auditable records upon which the PLU can be verified

[41] Egan Direct, p. 6.

[42] Wilson Direct, p. 15-17, 26-27; Hunt Direct, p. 44.

[43] Hunt Direct, p. 47.

[44] 47 C.F.R. § 51.321.

Above and beyond the evidence that shows Level 3's approach is eminently feasible, practical, efficient and economically balanced, SBC's own witness does not dispute the fact that it is technically feasible to exchange all forms of traffic over a single trunk group. Rather, Mr. Albright explains that "previous [FCC] decisions allowed each carrier to combine traffic as long as the carrier did not do so to avoid paying access charges."[45]

To Level 3, that should be the end of the issue. Where the language of a statute is clear and unambiguous, a court must give it effect as written, without reading into it exceptions, limitations, or conditions that the legislature did not express. "We are to begin with the text of a provision and, if its meaning is clear, end there." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6, 120 S.Ct. 1942 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.'" (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146 (1992)). "In interpreting the meaning of a statute, it is axiomatic that a court must begin with the plain language of the statute." *United States v. Prather*, 205 F.3d 1265, 1269 (11th Cir. 2000). When the statutory language is clear on its face, an inquiring court must apply the statute as written, and "need not consult other aids to statutory construction." *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003); *U.S. v. Charles George Trucking Co*., 823 F.2d 685, 688 (1st Cir. 1987) ("So long as the statutory language is reasonably definite, that language must ordinarily be regarded as conclusive.").

Under Section 251(c)(2)(C), SBC is obligated to provide interconnection to Level 3 that is at least equal in quality to that provided SBC's affiliates or any other carrier. For years, ILECs such as SBC routinely have established and used network facilities to carry all types of traffic on a single trunk.[46] Further, the evidence demonstrates that many CLECs are currently using interconnection trunk groups for multiple types of traffic in many states, some of them for more than five years.[47]

To comply with the nondiscriminatory requirements of Section 251(c)(2)(C), SBC must extend the same level of interconnection to Level 3 that SBC provides to itself or another carrier. If SBC makes available to itself or its affiliates local interconnection trunks that carry mixed types of traffic, SBC is required by Section 251(c)(2)(C) to make the same available to Level 3. For this reason alone, SBC's proposals must be rejected in their entirety, and Level 3's extension of the current interconnection regime be adopted.

In light of the fact that SBC's proposed language prohibits Level 3 from interconnecting at any technically feasible point in violation of Section 251(c)(2)(B) and fails to provide Level 3 with interconnection that is at least equal to that provided itself in violation of Section 251(c)(2)(C), then SBC's language fails to meet the "Just and Reasonable" standard in violation of Section 251(c)(2)(D).

---

[45] Albright Direct, p. 42-43.

[46] The FCC established rules for the calculation of PIU factors over two decades ago, allowing interexchange carriers and LECs to interconnect without establishing separate trunk groups for interstate and intrastate traffic. *See Investigation of Access and Divestiture Related Tariffs,* 97 FCC 2d 1082 (1984). See also, Petition, ¶¶ 39, 42.

[47] Wilson Direct, p. 21.

Level 3 also argues that the *FCC's Verizon Arbitration Order* provides guidance on the appropriate manner in which the Commission should address the issue. Just as with SBC in this arbitration, in the *FCC Virginia Arbitration Order*[48], Verizon had attempted to impose on WorldCom the obligation to create trunk group facilities distinct from WorldCom's existing trunk groups solely for the purpose of routing non-local exchange traffic.[49] WorldCom objected because it imposed a disproportionate expense on WorldCom to create these additional trunk groups. Verizon contended that the separate trunk groups were necessary to ensure that it was receiving accurate compensation from WorldCom. The FCC Wireline Competition Bureau, however, rejected the ILEC's argument and held that "that measures less costly than establishing separate trunking may be available to ensure that Verizon receives appropriate payment.[50]

Level 3's proposed language reflects the FCC Wireline Competition Bureau's conclusions in the *Virginia Arbitration Order*. By contrast, SBC's proposed language imposes on Level 3 a disproportionate level of expense by attempting to create an obligation that Level 3 establish separate trunk group facilities distinct from the existing local Trunk Groups solely for the purpose of routing non-local exchange traffic. Finally, Level 3 points the Commission to a number of orders from other state commissions that support its positions.[51]

A fundamental question embedded in these issues is whether SBC has any authority to force another carrier (here Level 3) to segregate traffic exchanged between the Internet and the PSTN onto separate trunk groups by application of its federal tariffs. Setting aside the staggering bravado with which SBC complains to state and federal regulators that ISP-bound traffic (*i.e.* that traffic originating on the PSTN and terminating to the Internet) should be subject to bill and keep, while simultaneously claiming that access charges apply when signals containing voice originate to or terminates from the Internet, SBC's reliance upon its federal tariffs for such justification jeopardizes the validity of their federal access tariffs.

As explained in the Intercarrier Compensation section below, SBC acknowledges that IP-Enabled traffic is "information" services traffic. As further described in the Intercarrier Compensation section below, "Information Services" are regulated under Title 1 of the Act; they not "telecommunications services" which are regulated under Title II. Tariffs are creatures of Title II of the Act.

---

[48] *FCC Virginia Arbitration Order*, at ¶52.

[49] Specifically, busy line verification and emergency interrupt calls for customers that do not use Verizon as their primary operator services provider.

[50] *FCC Virginia Arbitration Order*, ¶ 180 – 182.

[51] Order Approving Arbitration Agreement with Modifications, In the matter of the application of Sprint Communications Company, L.P. for arbitration to establish an interconnection agreement with Ameritech Michigan, Case No. U-11203, pp. 4-5 (1997); Amended Final Order Modifying Arbitration Award and Approving Interconnection Agreement. In the Matter of: *Petition of Sprint Communications Company L.P. d/b/a Sprint for Arbitration with Verizon Southwest Incorporated (f/k/a GTE Southwest Incorporated) d/b/a Verizon Southwest and Verizon Advanced Data Inc. Under the Telecommunications Act of 1996 for Rates, Terms, and Conditions and Related Arrangements for Interconnection.* Texas PUC Docket No. 24306 (May 14, 2004);Order, *In Re AT&T Communications of the Southwest, Inc.*, Case No. TO-97-40, 1996 WL 883975, p. *6 (1996); *US West Communications, Inc. v. MFS Intelnet, Inc*. 193 F.3d 1112, pp. 1124-1125, 1999 WL 799082 (9th Cir.(Wash.)) (1999)

Congress has enacted a detailed system for governing carrier rates for jurisdictionally interstate communications in Sections 201 through 208 of the Act. Substantively Section 201(b) requires rates terms and conditions to be "just and reasonable," while Section 202 bans unreasonable discrimination.

These substantive requirements are implemented via Sections 203 through 208. Section 203 requires that tariffs ("schedules") be filed for all "interstate and foreign wire and radio communications." 47 U.S.C. § 203; *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 229-231 (1994) ("*MCI v. AT&T*"); AT&T v. Central Office Telephone, 524 U.S. 214 (1998). Section 204 allows the FCC to suspend filed but not-yet-effective tariffs; places the burden of justifying them on the carrier; and permits retroactive refunds of initially-suspended charges found to be unreasonable. *Southwestern Bell v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999). Section 205 allows the FCC to prescribe changes to existing tariffs, but only prospectively. *Illinois Bell v. FCC*, 966 F.2d 1478, 1481 (D.C. Cir 1992). Section 206 establishes carrier liability for damages due to their violations of the Act. *MCI Telecom. Corp. v. FCC,* 59 F.3d 1407, 1413 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1240 (1996). Section 208 directs the FCC to adjudicate such claims. *AT&T v. FCC,* 978 F.2d 727, 732 (D.C. Cir. 1992), *cert denied,* 509 U.S. 913 (1993).

Consistent with this detailed statutory design, the FCC has promulgated extensive rules applicable to federal tariffs, primarily in Part 61 of the FCC's rules. Primary among tariff requirements is clarity. "In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2.

SBC maintains, without legal justification, that Section 6 of its federal access tariff (FCC No. 1) specifically requires that Level 3 purchase Feature Group D access trunks for the exchange of information services traffic between SBC and Level 3. Nowhere does this tariff, however, clearly and explicitly apply its rates and regulations to information services language. Moreover, by definition, it could not do so. Even if SBC's attempts to argue its way out of well settled law that enhanced service providers are not customers but rather carriers under federal law, no state or federal commission has stated such is the case. In either case, SBC's tariff must be rendered invalid and possibly *void ab initio* to the extent is seeks to leverage ambiguity either in the tariff or in state and federal regulation. Moreover SBC risks liability for unjust rates and unreasonably discriminatory practices to the extent it seeks to apply access tariff rates terms and conditions to traffic that is either outside of the tariff's scope or to which the tariff because of inherent and impermissible ambiguity, applies.[52]

[52] The FCC and the DC Circuit Court of Appeals have repeatedly struck down CLEC tariffs that applied to TDM-IP traffic (i.e. ISP-bound traffic). Here, traffic would be delivered from the PSTN to the Internet and would also be delivered from the Internet to the PSTN. In both cases, whether for ISP-bound traffic or information services traffic (such as VoIP), the FCC has established how such traffic should be rated. Thus, any attempt by SBC to apply its federally tariffed rates, terms and conditions to this traffic must fail for the same reasons that CLEC attempts to apply tariffed rates, terms and conditions to ISP-bound traffic. In that series of cases, the FCC also held that the CLEC's tariff was *void ab initio. See, e.g. Global Naps, Inc. v. FCC,* 247 F.3d 252 (D.C. Cir. 2001); *In The Matter Of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia,*

On purely jurisdictional grounds, however, this Commission is precluded from finding that SBC's access tariffs require Level 3 to purchase Feature Group access trunks for the exchange of IP-Enabled traffic. Without those tariffs, SBC has no basis to even offer Level 3 Feature Group D access services for the exchange of IP-Enabled traffic.

The issue facing the Commission is actually quite simple: Is there any technical justification in network engineering or design that should preclude Level 3 from exchanging all forms of telecommunications traffic over a single trunk group? As demonstrated in great detail above, the clear answer to that query is "no". In fact, the evidence shows that it is always preferable to combine as much traffic as possible onto a single trunk group. When a large trunk group is split into two trunk groups half their size (as SBC would have happen), the total carrying capacity of the two smaller trunks is smaller than the original trunk larger group. Thus, SBC's proposal to split the existing trunk group into multiple trunk groups to carry the various types of traffic actually results in a far less efficient network, with related increases in costs of providing the additional trunk groups.

Moreover, SBC's proposal increases the burden on both Parties' networks, requiring duplicative trunk groups connecting each and every switching facility to Level 3's POI – one for local and intraLATA toll traffic, one for non-local access traffic and IP Enabled Traffic (including ISP Bound Traffic) and yet another for transit traffic. SBC witness Albright not only acknowledges that SBC's approach increases Level 3's costs, but further that it imposes "almost no cost to SBC."[53]

Yet, what the evidence does *not* show is any technical or operational rationale for this inefficient engineering demand that SBC admits will drive up Level 3s costs of providing service. The reason for that evidentiary vacuum is simple -- there is no technical or operational rationale for the proposal. Rather, SBC's concern is one of money. SBC wants to force Level 3 into this unnecessary and expensive network configuration in order to allow SBC to properly track and bill its access charges.

In comparison, under Level 3's proposal, each party is entitled to receive the rate of compensation that properly applies to each type of call, but this compensation does not come at the sacrifice of network efficiencies. Level 3's language continues the current interconnection structure whereby Level 3 can efficiently use its trunks for multiple types of traffic, while still making appropriate intercarrier compensation payments to SBC based on industry-standard Percent of Interstate Use ("PIU") and Percent of Local Use ("PLU") allocators.

Section 251(c)(2)(B) mandates that SBC provide Level 3 with interconnection "at any technically feasible point within its network." This section gives the requesting carrier, Level 3,

---

Inc., New York Telephone Company, And New England Telephone And Telegraph Company V. Global Naps, Inc., File No. E-99-22, FCC 99-381 Memorandum Opinion and Order (Rel. December 2, 1999). Moreover SBC risks liability for unjust rates and unreasonably discriminatory practices to the extent it seeks to apply access tariff rates terms and conditions to traffic that is either outside of the tariff's scope or to which the tariff because of inherent and impermissible ambiguity, applies.[52]

[53] Albright Direct, p. 40-42.

the right to choose the manner in which the interconnection will take place. Level 3 has chosen to interconnect via a single set of trunks meeting at a specific point of interconnection in each local calling area. SBC's demands to have Level 3 build out additional and expensive trunks impose obligations on Level 3 that are inconsistent with the clear language of Section 251(c)(2)(B), with no technical reason or basis for doing so.[54]

Also, SBC's demands are inconsistent with Sections 251(c)(2)(C) and 251(c)(2)(D) of the Act, both of which impose an obligation for SBC to treat Level 3 in a nondiscriminatory manner when interconnecting. If SBC makes available to itself or any other carrier the ability to carry traffic over a single trunk group, it is obligated to do so for Level 3 as well. Even SBC witness Albright admits that combined traffic is currently exchanged over the same trunk groups today.[55] In addition, many CLECs are currently using interconnection trunk groups for multiple types of traffic in many states.[56] In fact, Level 3 and BellSouth have executed agreements that allow for the parties to exchange all forms of traffic, including interLATA toll and IP Enabled Traffic, *over a single trunk group*.[57] There can be no doubt that ILECs can, in indeed do, allow for exchanging all forms of traffic over a single trunk group.

Finally, Level 3's language is consistent with the FCC's *Virginia Arbitration Order*, where the FCC's Wireline Competition Bureau held that establishing separate trunks for traffic that may or may not have different forms of traffic that "would impose costs on WorldCom that are disproportionate to the problem sought to be solved." For this reason the Bureau went on to hold that "measures less costly than establishing separate trunking may be available to ensure that Verizon receives appropriate payment."[58] Level 3's proposed language reflects the FCC Wireline Competition Bureau's conclusions in the *Virginia Arbitration Order*. By contrast, SBC's proposed language imposes on Level 3 a disproportionate level of expense by imposing an obligation on Level 3 to establish separate trunk group facilities distinct from the existing local Trunk Groups solely for the purpose of routing non-local exchange traffic.

In light of the above arguments, the Commission must adopt Level 3's language in ITR Appendix Sections 5.3, 5.3.1.1 and 5.3.2.1.

Level 3 ITR Issue 12

LEVEL 3 POSITION

This issue is directly related to ITR Issue 1 above. The Commission should adopt terms consistent with its findings therein. For the reasons stated in IC Issue 1 above, the Commission must adopt Level 3's language in ITR Appendix Section 5.3.3.1.

Level 3 ITR Issue 13

[54] Wilson Direct, p. 15-17, 26-27; Hunt Direct, p. 44.

[55] Albright Direct, p. 43.

[56] Wilson Direct, p. 21.

[57] Hunt Direct, p. 47.

[58] *FCC Virginia Arbitration Order*, ¶ 180 – 182.

LEVEL 3 POSITION

This issue is directly related to SBC's claim that Level 3 must establish separate trunks for local and non-local trunks. SBC's language in ITR Appendix Section 5.4.1 attempts to impose Meet Point Trunk Groups for the transmission and routing of traffic between Level 3's end users and IXCs. Level 3 argues that it is able to carry all types of traffic over its interconnection trunk groups, and is not obligated to carry such traffic over Meet Point Trunk Groups. Under the unambiguous requirements of the Act, SBC is obligated pursuant to Section 251(c)(2)(B) to provide Level 3 with interconnection "at any technically feasible point within its network". This section gives the requesting carrier, Level 3, the right to choose where and how the interconnection will take place. The ILEC, in turn, must provide the facilities and equipment for interconnection at that point. Further, under the congressional mandates contained in Section 251(c)(2)(C), SBC is obligated to provide interconnection to Level 3 that is at least equal in quality to that provided SBC's affiliates or any other carrier. SBC has been allowed to combine for itself and other CLECs a mix of local and non-local traffic over the same trunk groups. Under Section 251 (c)(2)(C), it must also do so for Level 3.

IC Issue 14

LEVEL 3 POSITION

As for IC Issue 14(a), this Issue is directly related to ITR Issue 4(a) and NIM Issues 1, 2 and 6 above. For the reasons stated therein, the Commission must adopt Level 3s language in ITR Appendix Sections 5.4.3, 5.4.4 and 5.4.6.

With respect to Level 3 ITR Issue 14(b) and SBC ITR Issue 14(c), this issue is addressed in NIM Issue 6. For the reasons stated therein, it is apparent that each party is responsible for transporting their own traffic to the POI, including the financial costs associated with that transport. The Panel must make its determinations in ITR Issue 14(c) consistent withits findings in NIM Issue 6. As such, the Panel should adopt Level 3's language in ITR Appendix Sections 5.4.3, 5.4.4, and 5.4.6.

ITR Issue 15

LEVEL 3 POSITION

With respect to ITR Issue 15(a), Level 3 argues that the Agreement should make clear that SBC is prohibited from blocking Circuit Switched traffic, not just switched access traffic. As such, it proposed language that makes clear SBC cannot block all "Telecommunications Traffic", as that term is defined in the Act and encompasses all circuit switched traffic. Under SBC's proposed language, SBC is only obligated to block ""switched access customer traffic", which is not only undefined in the Act and the Agreement, but uneccesarily limits SBC's obligations to only switched access services.

As for ITR Issue 15(b), Level 3 notes that it is able to establish a Single Point of Interconnection in each LATA in which it serves. Under Section 251(c)(2), each CLEC, like Level 3, is authorized to establish a SPOI in each LATA. The FCC and this Commission has repeatedly held that the FCC's rules allow a CLEC to request interconnection at the technically

feasible point, including the right to request a single POI in the LATA.. SBC's proposed language (if adopted) would absolve itself of the responsibility to route its traffic to Level 3's POI.

ITR Issue 16

LEVEL 3 POSITION

As for IC Issues 16 (a) and (b), these issues are directly related to the ability of Level 3 to carry multiple types of traffic over the interconnection trunks. With respect to the issue of whether Level 3 should be able to combine both local and non-local traffic on a single interconnection trunk, Level 3 believes it should be able to do so. Under the unambiguous requirements of the Act, SBC is obligated pursuant to Section 251(c)(2)(B) to provide Level 3 with interconnection "at any technically feasible point within its network". This section gives the requesting carrier, Level 3, the right to choose where and how the interconnection will take place. The ILEC, in turn, must provide the facilities and equipment for interconnection at that point. Further, under the congressional mandates contained in Section 251(c)(2)(C), SBC is obligated to provide interconnection to Level 3 that is at least equal in quality to that provided SBC's affiliates or any other carrier. SBC has been allowed to combine for itself and other CLECs a mix of local and non-local traffic over the same trunk groups. Under Section 251 (c)(2)(C), it must also do so for Level 3.

For IC Issue 16(c), Level 3 argues that in the event that Level 3 delivers a post-queried 800/8yy call for SBC, the exchange of such traffic should be mutually handled. Level 3 notes that SBC only response on this issue is that it currently does not route 8YY traffic through Level 3. This, however, is not responsive to the intent of Level 3's language, which addresses the possibility that SBC may alter course in the future and rely on Level 3 for such traffic. In that event, Level 3's language is a reasonable proposal and should be adopted to prevent confusion or disputes in the future.

ITR Issue 17

LEVEL 3 POSITION

ISSUE RESOLVED[59]

ITR Issue 18(a)

LEVEL 3 POSITION

SBC's definition of Switched Access Traffic, as presented in ITR Appendix Section 12.1, should not be included in the agreement. SBC's definition imposes a requirement that the definition include traffic that originates from the end user's premises in IP format and is transmitted to the switch of a voice communications provider when such switch utilizes IP technology, also known as IP-PSTN. To top it off, once SBC has deemed Level 3's traffic as Switched Access Traffic, the traffic is subject to SBC's access charges.

[59] See, August 30, 2004 Joint DPL, Intercarrier Compensation Issue 17, SBC Position/Support.

SBC's attempt to lump IP-Enabled Traffic into the definition of Switched Access Traffic is contrary to federal law, and an attempt by SBC to puff its access revenues with an additional source of funding. As explained in the discussions related to Intercarrier Compensation, there is no FCC order, rule or regulation that concludes that Level 3 should pay access charges when an SBC customer terminates a call to a Level 3 IP customer. Just the opposite. In the *Worldcom Order*, the US Court of Appeals for the District of Columbia held that Section 251(g) of the Act preserves the pre-1996 Act access charge rules. Because there was no pre-1996 access charge rule governing intercarrier compensation for IP-Enabled service traffic, such traffic must be exchanged at cost-based rates pursuant to Section 251(b)(5) of the Act.

In light of these facts, SBC's attempts to lump IP-Enabled Traffic into its misguided definition of Switched Access Traffic, done in an attempt to impose access charges on Level 3's traffic, violates federal law. The Commission must reject SBC's language in ITR Appendix 12.1, and ensure that IP-Enabled Traffic is not subject to any form of access charge.

ITR Issue 18(b)

LEVEL 3 POSITION

In its language in ITR Appendix Section 12.1, SBC imposes a requirement that Level 3 exchange its IP-Enabled Traffic, including IP-PSTN traffic, "over feature group access trunks". Such a requirement violates the unambiguous language of the Act, and must be rejected *in toto*.

Section 251(c)(2) of the Act requires SBC to provide Level 3 with interconnection "at any technically feasible point within its network". This section gives the requesting carrier the right to choose the manner in which the interconnection will take place. Level 3 has chosen to interconnect via a single set of trunks meeting at a specific point of interconnection in each local calling area.

This issue is also directly related to ITR Issue 11(b) above. For the reasons stated therein, and the fact that there are no technical reasons prohibiting SBC from using the local trunk groups for exchanging all forms of traffic, the Commission must reject SBC's proposed language attempting to force Level 3 to build out separate trunk groups to carry IP-Enabled Traffic. Rather, the Commission must adopt Level 3's more rationale recommendation in ITR Appendix Section 12.1, and refer to the definition of "Circuit Switched Traffic" as found in the IC Appendix.

ITR Issue 19

LEVEL 3 POSITION

In its language in ITR Appendix Section 13.1, Level 3 incorporates a reference to the Intercarrier Compensation Appendix terms related to the definition, terms and conditions of IP-Enabled Services as found in the IC Appendix. This clarification will reduce confusion over the terms related to IP-Enabled services, and future disputes between the Parties. There is no harm in incorporating a reference to other valid and applicable portions of the agreement. As such, the Commission must adopt Level 3's proposals in ITR Appendix Section 13.1.

VI. ISSUES ON INTERCARRIER COMPENSATION APPENDIX

IC Issue 1

LEVEL 3 POSITION

SBC is attempting to restrict the scope of traffic to which Section 251(b)(5) intercarrier compensation regimes apply. Under the federal Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located. By its very terms, Section 251(b)(5) applies to "the transport and termination of telecommunications." To this clear definition, SBC attempts to impose a geographic standard that is not contained in Section 251(b)(5). Indeed, SBC seeks to reincorporate a geographic test that the FCC abandoned in its 2001 *ISP Remand Order*. In that order, the FCC expressly repudiated earlier rules that limited Section 251(b)(5) to "local" traffic.[60] That ruling was not disturbed on appeal.

SBC's attempts to craft a definition of this "Section 251(b)(5) Traffic" is directed towards presupposing the results of the FCC's deliberations in the *ISP Remand Order*. Level 3 proposes that it would be best if the parties and this Commission wait until the FCC has released its ISP Remand Order. As such, Level 3 urges the Commission to reject SBC's attempts at preempting the FCC's deliberations in the upcoming *ISP Remand Order*, and reject SBC's proposed language in IC Appendix Sections 3.1, 3.1.1 – 3.1.5.

IC Issue 2(a-c)

LEVEL 3 POSITION

Initially, Level 3 notes that there are four pending proceedings at the FCC that will address the regulatory treatment of IP Enabled traffic, and the rate of compensation that will apply to the exchange of this traffic:

- *In the Matter of Level 3 Communications LLC's Petition for Forbearance Under 47 U.S.C.§ 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1) and Rule 69.5(b).* ("Level 3 Forbearance Petition").[61]
- *In the Matter of IP Enabled Services* ("IP-Enabled Services Proceeding")[62]
- *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and In the Matter of Intercarrier Compensation*

[60] *ISP Remand Order*, ¶¶ 37-42.

[61] WC Docket 03-266, *Level 3, LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, filed Dec. 23, 2003. ("*Level 3 Forbearance Petition*").

[62] WC Docket 04-36, *In the matter of IP Enabled Services*, Notice of Proposed Rulemaking, released March 10, 2004. ("*IP Enabled Services Docket*").

for ISP-Bound Traffic, Order on Remand and Report and Order[63] (collectively "*ISP Remand Order*").

- *Developing a Unified Intercarrier Compensation Regime, ("Intercarrier Compensation NPRM")*[64]

While these issues are playing out in other proceedings, the Commission should let the FCC decide the compensation issues by rejecting SBC's attempts to set the rate of compensation for this traffic, and instead focus its efforts on the network architecture issues that address how Level 3 and SBC will exchange traffic.

Level 3 argues that the Act gives the FCC extensive authority over all compensation for IP-Enabled services. Thus, the Commission need not decide the exact rate of compensation that would apply to resolve this arbitration. For purposes of this Arbitration, Level 3 and SBC disagree on whether the Interconnection Agreement should contain terms with respect to the compensation of IP enabled traffic. Level 3 requests that the Commission conclude that the Interconnection Agreement between Level 3 and SBC contain no provisions that specifically set a rate of compensation for IP Enabled traffic. This would provide that the Commission reject *en toto* SBC's proposed Section 16.1 of the Intercarrier Compensation Appendix. If the Commission concludes that it must set the rate of compensation for IP Enabled traffic, Level 3 requests that the Commission set the rate of compensation at $0.0007 for the exchange of IP-enabled traffic (IP-PSTN or PSTN-IP).

Level 3 requests that the Commission reject SBC's attempts to define traffic in such a way that would impose access charges on IP enabled traffic.

Level notes that even SBC acknowledges that IP-enabled services—services that either begin or end on an IP network—are information services, and that providers of such services are information services providers.[65] Level 3 agrees with that statement. Level 3 further agrees with SBC's recent observation at the FCC when SBC stated that "IP-Enabled services should be deemed Title I information services."[66] As SBC observed,

> IP-enabled services may allow end users to connect to the Internet (a functionality that the Commission has long deemed an information service, gain access to stored files (such as voicemail or directory information), protect their privacy through customized call screening, and route communications in a manner customized to the end user's preferences. Many IP-enabled services also include a net protocol conversion that allows customers to interface with the PSTN –

[63] CC Docket No. 99-68 and CC Docket No. 99-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 (¶ 32) (rel. April 27, 2001) ("*ISP Remand Order*").

[64] CC Docket No. 01-92, In the Matter of Developing a Unified Intercarrier Compensation Regime Notice of Proposed Rulemaking, FCC 01-132 ¶¶ 72,112 (rel. April 27, 2001)("*Intercarrier Compensation NPRM*")

[65] *See IP-Enabled Services*, WC Docket No. 04-36, Comments of SBC Communications, Inc. at 33 (filed May 28, 2004) ("SBC IP NPRM Comments").

[66] *SBC IP-Enabled Services Comments* at 33.

> traditionally a hallmark of information services under the Commission's precedent.[67]

From Level 3's perspective, SBC's proposed contractual definition for "IP Traffic" is flawed and inconsistent with SBC's arguments before the FCC.[68] SBC attempts, through its proposed contract terms, to have Circuit Switched (or "TDM") compensation arrangements apply to IP-TDM and TDM-IP traffic. *First*, Level 3 argues that the Act defines information services without distinguishing between originating and terminating traffic.[69] SBC's proposed definition of "IP Traffic" in its Section 16.1 only includes traffic that originates with an IP end user and terminates on the PSTN. In other words, according to SBC, it is attempting to convince this Commission that IP-Enabled services are only a one-way concept, IP to PSTN. Juxtaposed against that position before this Commission are SBC's comments to the FCC, where SBC's own definition of IP-Enabled Services contemplates a reciprocal traffic flows.

Second, SBC's definition includes only IP-enabled traffic that ***originates*** with a Level 3 or SBC end user – ignoring the fact that IP-enabled traffic can also flow in the opposite direction. SBC's unjust limitation is not found in any FCC rule or regulation. The traffic exchanged between Level 3 and SBC may originate on the customer premises equipment of the end user of SBC, Level 3, an information service provider, CLEC, ILEC or other telecommunications carrier.[70]

Level 3 and SBC both agree that IP-Enabled Services are interstate services. In comments filed by SBC in the IP-Enabled Services Rulemaking proceeding, SBC states:

> The inherently interstate nature of these [IP-enabled] services derives from the nationally and internationally dispersed networks over which they are provided. ***These services are also indivisibly interstate*** because their portable nature and the inherent geographic indeterminacy of IP transmissions make it infeasible to segregate any intrastate component of these services for regulatory purposes.[71]

SBC admits to the FCC that "when end users use an IP-enabled service to communicate with each other, the interstate nature of the service is engaged no matter where the end users are physically located."[72] Further, in its own Petition for a Declaratory Ruling Regarding IP Platform Services, SBC explains that "it would be impracticable, as well as inimical to the

---

[67] *SBC IP-Enabled Services Comments* at 34.

[68] Hunt Direct, p. 72.

[69] *See* 47 U.S.C. § 153(20); *see also Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, 11,511-53 ¶¶ 21-106 (1998) ("*Stephens Report*") (examining the statutory in great detail without noting any distinction between originating and terminating traffic).

[70] Hunt Direct, p. 65.

[71] Hunt Direct, p. 66, citing to SBC IP-Enabled Services Comments at 26.

[72] SBC IP-Enabled Comments at 28.

technological premise of the Internet, to separate out any discrete, 'intrastate' components of that data stream."[73]

Level 3 argues that, as an interstate service, this Commission is precluded from adopting SBC's contract terms that imposes access charges on IP-TDM or TDM-IP traffic. As interstate traffic, SBC may only assess access charges, if at all, when permitted to do so under the FCC's access charge rules. Section 69.5 of the FCC's rules, which governs the assessment of circuit-switched per-minute access charges,[74] classifies access customers as either "end users" or "carriers."[75] Specifically, customers classified as end users pay flat rate "end user charges" (such as the Subscriber Line Charge),[76] while "all interexchange carriers" that "use local exchange switching facilities for the provision of interstate or foreign telecommunications services" pay "carrier's carrier charges."[77] As the FCC recently reaffirmed, "access charges are to be assessed on interexchange carriers."[78] Level 3 notes that the FCC classified information service providers as "end users," not carriers, for the purpose of applying its interstate access charge rules.[79] The FCC has reconfirmed this finding a number of times over the years, including in its *Access Charge First Report and Order*, wherein it stated that "incumbent LECs will not be permitted to assess interstate per-minute access charges on [information service providers.]"[80] The FCC did not distinguish between originating and terminating access charges but rather precluded incumbent LECs from assessing ***any*** access charges.

Accordingly, Level 3 argues, information service providers pay end user charges, not carrier charges, and thus are not subject to per-minute access charges.

In addition to the FCC actions stated above, Level 3 also argues that the Act bars the application of access charges to IP-Enabled Services. For instance, as the FCC has itself recognized, Section 251(b)(5) – the Act's reciprocal compensation provision – applies to all telecommunications traffic unless that traffic is carved-out by another provision of the Act, Section 251(g).[81] As the D.C. Circuit explained in 2002, Section 251(g) cannot function as a

[73] SBC Illinois's Response to Petition for Arbitration., June 28, 2004, at 37-38. ("SBC Petition")

[74] *See* 47 C.F.R. § 69.5.

[75] Hunt Direct, p. 68 explaining Section 69.5(a) which governs end users, while Section 69.5(b) governs carriers. Rule 69.5(c) provides for special access surcharges. *See* 47 C.F.R. § 69.5.

[76] 47 C.F.R. § 69.5(a).

[77] 47 C.F.R. § 69.5(b).

[78] *Petition for Declaratory Ruling that AT&T's Phone to Phone IP Telephony Services are Exempt from Access Charges*, Order, FCC 04-97, n.92 (rel. April 21, 2004).

[79] *See, e.g., MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241 (1983) (adopting Rule 69.5), *affirmed sub nom Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *Stephens Report*, 13 FCC Rcd. at 11,511-12, 11,523-24 ¶¶ 26, 44-46.

[80] Hunt Direct, p. 70-71 citing to *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. 15,982, 16,133 ¶ 344 (1997).

[81] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 ¶ 32 (2001) ("*ISP-Bound Traffic Remand Order*").

"carve-out" with respect to IP-enabled services traffic because there was no pre-1996 rule governing the exchange of such traffic between LECs. [82] Contrary to what SBC witness Mr. Kirksey contends, just as there was no "pre-Act" rule governing the exchange of ISP-bound traffic, there were no pre-Act rules governing exchange of IP-Enabled traffic. Absent any pre-Act rule, access charges cannot apply to such traffic under Section 251(g). Rather, as the FCC held in the *ISP Remand Order*, without Section 251(g), the reciprocal compensation regime of Section 251(b)(5) applies to the exchange of all traffic between an ILEC and another telecommunications carrier, such as Level 3.[83]

Next, Level 3 argues that the FCC rules also prohibit an ILEC from assessing access charges on an interconnected CLEC that serves an IP-enabled information services provider – even if the ILEC believes that the IP-enabled services provider should be paying access charges. In support, Level 3 points to the FCC's recent *AT&T Declaratory Ruling*, wherein the FCC found that AT&T was an interexchange carrier with respect to certain telephone calls that originated and terminated in circuit-switched format.[84] Although the FCC found that an ILEC may assess access charges against AT&T as an interexchange carrier, the FCC noted that an ILEC may not assess access charges against a CLEC as a means of assessing charges against the interexchange carrier.[85] Level 3 argues that by the same token, an ILEC may not assess access charges against a CLEC serving an information service provider, even if the ILEC believes that the information service provider is an interexchange carrier.

Also, Level 3 notes that SBC's attempt to impose *intra*state access charges on IP-Enabled services traffic is improper because, as SBC itself has argued before the FCC, "IP-enabled services are indivisibly *inter*state in nature."[86] As SBC has acknowledged, IP-enabled services are jurisdictionally interstate because such services defy geographic categories.[87] Further, from a technical and operations perspective, it is currently impossible to separate IP-enabled traffic into interstate and intrastate components for jurisdictional purposes.[88] Indeed, SBC has observed that "it would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services."[89] In light of SBC's admission that such a project would be "nonsensical, as well as impractical and cumbersome", the Commission should reject SBC's proposed terms.

---

[82] *See WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*Worldcom*").

[83] *See ISP-Bound Remand Order*, 16 FCC Rcd at 9165-66 (¶ 31).

[84] *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, 7457 ¶ 1 (2004).

[85] *See id.* at 7471 n.92 ¶ 23 ("To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.").

[86] *IP-Enabled Services*, WC Docket No. 04-36, Reply Comments of SBC Communications, Inc. at 8 (filed July 14, 2004) (emphasis added).

[87] *See* SBC IP NPRM Comments at 25-33.

[88] *See Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3323 ¶ 24 (2004) ("*Pulver Order*").

[89] SBC Petition at 39.

Finally with respect to compensation for IP-Enabled Traffic, Level 3 argues that, by allowing SBC to inappropriately impose access charges on that traffic, this Commission would discriminate against Level 3 and stifle local competition. In support, Level 3 notes that SBC does not charge access charges to its "end user" customers that are ESPs. However, SBC does seek to impose access charges to Level 3 for the same traffic Thus, under SBC's proposal, a call from an SBC-served customer to a neighbor who subscribes to a cable-based IP-enabled service would require the cable company to pay SBC an originating access charge.[90] If that cable-based IP-enabled services customer subscribed to a circuit-switched CLEC service instead, SBC would owe the circuit-switched CLEC reciprocal compensation for the exact same call.

Level 3 notes that the impact of this arbitrary distinction is substantial. FCC statistics show that, in 2000 – the last year for which complete, actual data is available – National Exchange Carrier Association reported that almost 80% of all traffic was local in nature.[91] Thus, almost 80% of all traffic in 2000 was subject to cost-based reciprocal compensation. Under SBC's scheme proposed in this proceeding, an IP-enabled service provider with the same mix of local and toll traffic as described above (i.e., 80% local) would pay access to SBC for every minute of traffic that SBC originated, *including the 80% of traffic that was local*! By contrast, if that IP-enabled service provider were instead a circuit-switched provider, SBC would pay the CLEC reciprocal compensation for the 80 percent of traffic that is local, and the CLEC would pay SBC nothing for originating that traffic. Thus, under SBC's proposal, IP-enabled service providers would face a severe, yet unnecessary, anticompetitive disadvantage when providing the vast majority of their services—a disadvantage that the FCC has already banned in its reciprocal compensation rules.[92]

Further, Level 3 argues that SBC's proposal stunts innovation and conflict with the FCC's efforts to transition to a uniform intercarrier compensation regime. 47 U.S.C. § 230(b)(2) states that:

> It is the policy of the United States . . . to preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

Applying access charges instead of the reciprocal compensation regime, as SBC suggests, subverts Congress's express goal of encouraging IP-based innovation. Because the FCC is working to adopt a single unified intercarrier compensation regime that would not require

---

[90] *See Petition of SBC Communications Inc. for a Declaratory Ruling*, WC Docket No. 04-29, at 39 n.76 (filed Feb. 5, 2004) ("SBC Petition") ("[W]hen IP platform services originate as circuit-switched traffic on the PSTN (and terminate in IP) or, after originating in IP format are converted to circuit-switched traffic and terminate over the PSTN, there is no reason that intrastate access cannot and should not be taken into account in the assessment of intercarrier compensation.").

[91] Hunt Direct, p. 77 citing to Table 8.3, "Dial Equipment Minutes Summary," Universal Service Monitoring Report 2003, FCC Docket No. CC 98-202, at 8-6 (rel. December 22, 2003).

[92] *See* 47 C.F.R. 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.").

geographic specificity,[93] SBC's proposal subjects IP-enabled services to two unnecessary ans expensive regime changes in short order—first departing from the *status quo* (reciprocal compensation) to the access charge regime, and then, thereafter, reverting back to a uniform regime.

Level 3 provides additional policy reasons to illustrate the importance of applying intercarrier compensation rather than access charges for IP-Enabled traffic including:

1. Level 3 would never be able to viably compete against SBC because its costs of providing the same service are artificially high due to SBC's imposition of the access charges – forcing Level 3 to either charge its customers higher charges or eat the cost-differential from its profit margins. In either event, Level 3 would face an uneven competitive field due to artificial costs adopted by this Commission.

2. Because both SBC and Level 3 agree that it is not possible to track the geographic end point of the IP end of an IP-enabled service, it does not make sense to force IP-Enabled service providers like Level 3 to develop the capability to do so at a time when the FCC is considering shifting the access charge system to a unified intercarrier compensation system that would not require tracking the geographic end point of the IP end of a call. Forcing Level 3 to undergo the considerable costs associated with developing a system the even SBC admits does not exist places an artificial and unnecessary pressure on Level 3's retail rates.

The following are Level 3's findings on the IP-Enabled Services Traffic Intercarrier Compensation provisions of the parties Interconnection Agreement.

SBC acknowledges that IP-Enabled traffic is interstate in nature, and that IP-enabled services that either begin or end on an IP network are interstate information services. Notwithstanding this fact, SBC is attempting to convince this Commission to adopt its proposed language in IC Appendix Section 16.1 that imposes Switched Access charges on any IP-Enabled Traffic. SBC cannot explain this disparity in positions between the FCC and this Commission.

Section 251(b)(5) — the Act's reciprocal compensation provision — applies to all telecommunications traffic unless that traffic is carved-out by Section 251(g).[94] As the D.C. Circuit explained in 2002, Section 251(g) cannot function as a "carve-out" with respect to IP-Enabled services traffic because there was no pre-1996 rule governing the exchange of such traffic between LECs.[95] For that reason, the Interconnection Agreement should not contain terms and conditions that attempt to categorize IP-Enabled traffic, or that governs the conditions for the compensation of IP enabled traffic. As such, Level 3 encourages the Commission to

---

[93] *See Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001).

[94] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 ¶ 32 (2001) ("*ISP-Bound Traffic Remand Order*").

[95] *See WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*Worldcom*").

adopt Sections 3.2-3.4.5 of Level 3's proposed agreement, and reject SBC's proposed terms in Section 16.1.

IC Issue 2(d)

LEVEL 3 POSITION

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. IP-Enabled Traffic should not, and indeed cannot, be classified by the physical location of the calling and called parties. As SBC admits to the FCC in its Reply Comments in FCC Docket No. 04-36, there is not a technical manner at present to allow for any carrier to track the jurisdictional nature of IP-Enabled Traffic. In light of the fact that SBC's proposal in Section 16.1 of the IC Appendix is not even technically feasible, it must be rejected, and Level 3's more rational, and technically feasible, approach of using the originating and terminating NPA-NXX should be adopted, as is industry custom. The Commission should adopt Level 3's language in IC Appendix Sections 3.2.1.3, 3.2.2, 3.2.2.1, and 3.2.2.2.

IC Issue 2(e)

LEVEL 3 POSITION

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. It cannot be disputed that an IP-Enabled call requires a net protocol conversion from TDM to IP, or vice versa. As detailed in the discussion above, the FCC has discussed and relied upon this point in recent IP-related investigations, and should be acknowledged in the Agreement. As such, the Commission must adopt Level 3's language in IC Appendix 3.2.1.3.

IC Issue 2(f)

LEVEL 3 POSITION

In the event that the Commission determines it appropriate to include IP-Enabled Traffic terms in the Agreement, Level 3 proposes the common-sense approach to have it insert into the SS7 call setup message an indicator identifying the traffic as originating as an IP-Enabled call on Level 3's network. By so doing, it will allow the Parties to identify any traffic that originates on the Level 3 network, and will assist in tracking and billing.

For purposes of ensuring proper intercarrier compensation for IP-Enabled Traffic, Level 3 also proposes the use of allocators to determine the appropriate jurisdictional mix of traffic carried over the interconnection facilities. Such allocators are a standard industry practice, used by both SBC and Level 3 in the course of tracking traffic. For instance, Level 3 proposes that it be obligated to provide SBC with a Percent of IP Usage Allocator to identify the percentage of traffic that is in fact originating from an IP customer. This PIPU allocator will be based upon Level 3's actual and verifiable records of IP-originated traffic. In other words, SBC will be able to track and verify the amounts of IP-originated traffic that Level 3 asserts in any given time period.

From Level 3's perspective, this approach will benefit both SBC and Level 3. SBC's resistance to such an SS7 identifier confuses Level 3, in light of the benefits it will provide for purposes of intercarrier compensation. In light of the common-sense approach that Level 3 recommends and the benefits received through the use of an SS7 identifier and the PIPU allocator, the Commission should adopt its language in IC Appendix Section 3.2.2.3, 3.2.2.4, 3.2.2.4.1, 3.2.2.4.2, 3.2.2.4.3, and 3.2.2.5.

IC Issue 2(g)

LEVEL 3 POSITION

Level 3 argues that SBC should not be able to force Level 3 into building out a separate FGD network just so that it can track and bill Level 3 for IP-Enabled Traffic. From a common sense perspective, it does not make any sense to force Level 3 to go through the crushing expense of building out this network, when the FCC currently has before it several proceedings investigation the appropriate manner in which the route such traffic. Before forcing Level 3 to undergo expensive and time-consuming build out, the Commission should allow the FCC the opportunity to determine the appropriate manner in which to handle this traffic.

This Commission has previously considered this issue, adopting findings consistent with Level 3's proposal here. The Commission has held that, consistent with the FCC's *Local Competition Order*:

> It appears to the Commission that economic entry into the market requires that **Sprint be permitted to use its existing trunks for all traffic whenever feasible. Sprint has committed to provide accurate, auditable billing records.** Moreover, there are ways around the connection problems, as reflected by Suzanne Springsteen's admission that Ameritech Michigan can put local and non-local on the same trunk. **The problems for Ameritech Michigan appear to be billing and measurement problems, which can be reasonably resolved through establishing percentage of use factors**.[96]

This is the essence of what Level 3 has proposed in this arbitration – use the allocators to address the billing concerns of SBC, and allow Level 3 to provide auditable records upon which those allocations can be verified.

IC Issue 2(j)

LEVEL 3 POSITION

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. Level 3 proposes that the Commission not establish any rate of compensation for the exchange of IP Enabled traffic. The Commission should reject SBC's

[96] Order Approving Arbitration Agreement with Modifications, In the matter of the application of Sprint Communications Company, L.P. for arbitration to establish an interconnection agreement with Ameritech Michigan, Case No. U-11203, pp. 4-5 (1997) ("*Sprint Arbitration Order*").

Section 16.1, and not adopt Level 3's Section 3.2.3.1. However, if the Commission is compelled for whatever reason to establish a rate of compensation for the exchange of IP enabled traffic, it should adopt the rate of $0.0007, which is the rate of compensation that SBC elected to receive when it opted into the *ISP Remand Order*. When the FCC releases its expected intercarrier compensation revisions addressing IP-Enabled Traffic, the parties can negotiate the terms and use the Change in Law provisions of the agreement to incorporate those findings.

IC Issue 2(k)

LEVEL 3 POSITION

This issues is closely related to IC Issue 2(a-c) above, and therefore, Level 3 herein incorporates the same arguments. Level 3 proposes definitions of IP-Enabled Traffic and Circuit Switched Traffic that are derived from FCC Orders and regulations, namely the FCC's recent *AT&T IP Order*.[97] In that order, the FCC found that services that have the following characteristics is not "Information Services" traffic:

> (1) the carrier holds itself out as providing voice telephony or facsimile transmission service;
> (2) he Carrier does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network;
> (3) the Carrier allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and
> (4) the Carrier transmits customer information without net change in form or content.[98]

The FCC held that "this type of phone-to-phone IP telephony lacks the characteristics of an information service and bears the characteristics of a telecommunications service." Level 3's language in IC Appendix Sections 3.3, 3.3.1, 3.3.2, 3.3.2.1, 3.3.3, 3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.4.4.1, and 3.4.5 incorporate this distinction, consistent with the FCC's holdings, and should be incorporated into the final agreement.

IC Issue 3

LEVEL 3 POSITION

This issues is closely related to IC Issues 1 and 2 above, and therefore, Level 3 herein incorporates the same arguments. SBC is attempting to unlawfully restrict the scope of traffic to which Section 251(b)(5) compensation regimes apply. Under the Act, Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located. By its very terms, Section 251(b)(5) applies to "the transport and termination of telecommunications." To this clear definition, SBC attempts to impose a geographic standard that is <u>not</u> within the scope of Section 251(b)(5), and attempts to presume the direction of federal

[97] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004)

[98] *Id.*, ¶ 8.

law that will be expressed in the upcoming FCC ISP Remand Order or the FCC's investigations regarding IP Enabled services.

SBC's attempts to craft a definition of this "Section 251(b)(5) Traffic" is directed towards presupposing the results of the FCC's deliberations in the *ISP Remand Order*. Level 3 proposes that it would be best if the parties and this Commission wait until the FCC has released its *ISP Remand Order*, which is expected in the very near future. As such, the Commission should reject SBC's attempts at preempting the FCC's deliberations in the upcoming ISP Remand Order, and reject SBC's language in IC Appendix Section 3.2.

IC Issue 4

LEVEL 3 POSITION

Each of these issues will be decided by the Commission in its deliberations related to the ITR Issues 1 and 2 discussed above. For consistency, the Commission should adopt language in response to these issues that comports with the determinations made related to the obligation to build out these additional trunking interconnections. Level 3 believes that a fair reading of the legal requirements, as well as a common sense approach to network design, should lead the Commission to agree with Level 3 that it is appropriate and efficient to carry multiple forms of traffic over single interconnection trunks. As such, adoption of Level 3's language in Intercarrier Compensation Appendix Sections 4.7-4.7.1 consistent with the Commission's determinations above.

IC Issue 5

LEVEL 3 POSITION

A subpart of the foregoing issues relating to the appropriate rate of compensation for IP enabled traffic is the question of what is the appropriate rate of compensation for traffic that originates from SBC's customers and terminates to an Internet Service Provider ("ISP") that is a customer of Level 3 (or a customer of Level 3's customer.) It is Level 3's position that all "ISP Bound" traffic is to be compensated at a rate of $0.0007 per minute of use pursuant to the terms of the FCC's April 21, 2001 *ISP Remand Order*[99], regardless of the physical location of the ISP.

SBC's proposed contract terms request that a different arrangement known as "bill and keep" apply to some ISP-Bound traffic, namely those calls where the ISP is not physically located in the SBC customers' (the calling party) local exchange area, but is assigned a NPA-NXX that is associated with the local calling area of the SBC customer.[100] "Bill and keep" provides that each carrier bills its own customers for what ever services it may provide, and then "keeps" the revenue without the exchange of any compensation. Under this scenario, Level 3 would not receive compensation from SBC for the costs incurred by Level 3 in terminating

[99] *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand, FCC 01-131, 16 FCC Rcd 9151, Order on Remand and Report and Order (April 21, 2001.)

[100] See SBC Proposed Intercarrier Compensation Sections 5.1; 7.2.

SBC's calls. In addition, SBC proposes a series of compensation terms that relate to those circumstances when Level 3 uses SBC's unbundled local switching (ULS) network elements.[101]

Level 3's proposed terms take into account the existing federal rules and FCC decisions on ISP-Bound traffic. A single uniform rate of compensation for the exchange of all IP Enabled traffic (including VoIP and ISP-bound) at the rate of $0.0007 per minute of use.[102] In the event that the Commission chooses to establish a rate of compensation for the exchange of IP enabled (IP-TDM and TDM-IP) traffic (discussed above), then Level 3 requests that the Commission incorporate the ISP-Bound traffic rate of $0.0007 per minute of use, consistent with the FCC's *ISP-Bound Remand Order*, into Level 3's contract.

Level 3's proposed contract terms simplify the parties' Intercarrier Compensation appendix, particularly compared to SBC's Byzantine terms. Under Level 3's proposed contract certain traffic for which tariffs are already established (such as 8YY and toll traffic), would be exchanged under the parties' tariffs, everything else would be exchanged at a rate of $0.0007 This would include Circuit Switched (e.g. typical "local exchange traffic"), ISP-Bound (with no distinction made based on the geographic location of the callers), and IP enabled traffic.[103]

This Section of Level 3's brief will discuss the applicable law for the exchange of ISP-Bound Traffic. All ISP Bound Traffic must be exchanged at the rate of $0.0007.

In general, the parties agree that ISP-Bound traffic will be exchanged at the rate of $0.0007 if the calling party and the ISP are both physically located in the same local exchange. The disputed portion of the ISP-Bound traffic provisions of the parties' agreement relates to the treatment of Foreign Exchange ISP-Bound, or VNXX ISP-Bound calls. In its proposed Section 3.3 SBC seeks to define "ISP-Bound" traffic to include only those circumstances where the SBC originating customer and the Level 3 ISP are physically located in the same SBC local exchange. In the circumstance where the ISP is not physically located within the exchange of the originating caller, SBC's proposed contract curiously provides that "bill and keep" be the ISP-Bound compensation arrangement.[104]

In its April 2001 *ISP Remand Order*, the FCC asserted exclusive jurisdiction over compensation rates for ISP-bound traffic.[105] In the *ISP Remand Order*, the FCC ruled that traffic

[101] SBC proposed IC Appendix Section 5.7.

[102] Level 3 Proposed IC Section 5.2.3.

[103] Or $0.0007 if the Commission does not establish a rate of IP enabled traffic.

[104] SBC proposed IC Appendix Section 7.2.

[105] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; Intercarrier *Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order (rel. Apr. 27, 2001) ("*ISP Remand Order*") at ¶ 46; *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert.* denied, 538 U.S. 1012 (2003). Although the U. S. Court of Appeals for the D.C. Circuit remanded the *ISP Remand Order* to the FCC for further consideration, the Court did not vacate the Order, leaving the federal compensation regime in place while the FCC deliberates the issue once again. Accordingly, even though the legal reasoning providing the authority for the FCC to promulgate its federal compensation regime has been rejected, the federal compensation regime itself remains intact and applies in this case.

to ISPs was excluded from the reciprocal compensation requirements of Section 251(b)(5) by operation of Section 251(g) of the Act.[106] Further, the FCC held that state commissions no longer had jurisdiction to address the rates of compensation for ISP-bound traffic.[107] Thus, the FCC has sole authority to address the rate of compensation for the exchange of ISP-bound traffic. The FCC was very specific in its conclusion that:

> ***Congress excluded from the "telecommunications" traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs.*** Having found, although for different reasons than before, that the provisions of section 251(b)(5) do not extend to ISP-bound traffic, we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, ***and we establish an appropriate cost recovery mechanism for the exchange of such traffic.***[108]

This ruling appropriately includes intercarrier compensation for all ISP-Bound traffic, including FX or VNXX ISP-Bound traffic.

Therefore, Level 3 requests that the Commission order SBC and Level 3 to exchange all ISP-Bound traffic at the rate of $0.0007 per minute of use.

According to SBC, FX traffic should not be classified as local calls subject to ISP-Bound compensation.[109] Rather, SBC imposes bill and keep for both voice and ISP-Bound FX traffic.[110] With respect to FX services, Level 3 explains that FX is a service that has been offered by phone companies for many years and allows an end user (generally a business) to appear to have a local presence when in fact their office is not in reality located in the same local calling area as an originating caller.[111] The customer pays for an arrangement (a special trunk or other facility) that connects them to a network that covers a LATA.[112] The customer is given a phone number in the local calling area so that end users in that local calling area can call them by dialing a local phone number.[113] Today, Internet Service Providers ("ISPs") use FX type configurations so consumers can make local calls to their ISP when they need dial-up access.[114] For instance, FX-like services allow ISPs to offer local dial-up internet access throughout the

[106] This aspect of the *ISP Remand Order* was rejected though not vacated by the D.C. Circuit in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003)..

[107] *ISP Remand Order* at ¶¶ 52, 82.

[108] *Id.*, ¶ 1.

[109] McFee Direct, p. 18-19.

[110] McFee Direct, p. 19.

[111] Hunt Direct, p. 79-80.

[112] Wilson Direct, p. 62.

[113] Wilson Direct, p. 62; Hunt Direct, p. 81; McFee Direct, p. 17.

[114] Wilson Direct, p. 62.

state, including in more remote, isolated areas.[115] FX calls are routed between networks the same as any other local call.

Level 3 notes that, from a networking perspective, SBC's routing obligations for the call is the same no matter where the FX customer is physically located.[116] Whether SBC terminates an FX call to Level 3 for termination across the street from the SBC customer, or 400 miles away, SBC's obligation is to exchange that call at the Level 3 POI.[117] Further, the evidence shows that the originating and terminating switch or gateway for that FX call will have no way of knowing the geographic physical location of the called party where the called party is an IP enabled customer.[118] For billing purposes, calling an NPA-NXX number that is assigned or "homed" to the ILEC's originating local switch, the end user views the call as a local call and there is not a toll charge assessed.[119]

Level 3 asserts that it would be clear reversible error for the commission to accept SBC's attempts to create a false distinction between alleged "locally" dialed ISP-Bound traffic and FX / VNXX ISP-Bound traffic. There is no such distinction in the rate of compensation under the FCC's *ISP Remand Order*. All traffic bound to an ISP must be exchanged at a rate of $0.0007, regardless of the geographic location of either the originating caller or terminating party. SBC opines that the geographic physical location of the originating or terminating caller should determine whether the FCC's *ISP Remand Order* governs the rate of compensation.[120] SBC is wrong because the FCC's orders do not distinguish "local" ISP-bound traffic from "non-local" ISP-bound traffic. In fact, in the *ISP Remand Order*, the FCC repudiated its earlier distinction between "local" and "non-local" for all traffic:

> This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection [251](b)(5) as all "local" traffic. ***We also refrain from generally describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings, and significantly, is not a term used in section 251(b)(5) or section 251(g)***.[121]

[115] Hunt Direct, p. 81-82.

[116] Hunt Direct, p. 79-80.

[117] Wilson Direct, p. 62-63; Hunt Direct, p. 80..

[118] Wilson Direct, p. 62-63.

[119] Wilson Direct, p. 62-63.

[120] Wilson Direct, p. 59. As noted by Mr. Wilson, there are a number of technical problems with the method that SBC is promoting, not the least of which is that circuit switches have no way of knowing the geographic location of the calling or called parties. Wilson Direct, p. 59-60. From a network perspective, the local switches know which numbers are local, route the calls properly, and bill accordingly. Id. A call that is made between two numbers assigned to a local calling is treated as a local call, no matter that the call ultimately terminates at a foreign exchange.

[121] *ISP Remand Order* at ¶ 34.

To Level 3, the *ISP Remand Order* makes clear that the federal compensation regime applies to *all* ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include ***all access traffic*** that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[122] Nowhere does the *ISP Remand Order* limit its regime to "local" ISP-bound traffic.

Level 3's argues that its proposed contract terms are further supported in the very recent *FCC Core Forbearance Order*[123], which addressed Core's petition requesting the FCC refrain from enforcing the provisions of the *ISP Remand Order*. In summarizing its *ISP Remand Order*, the FCC stated that:

6. Its Growth Cap rules "imposed a cap on total ISP-Bound minutes for which a LEC may receive this [intercarrier] compensation equal to the total ISP-Bound minutes for which the LEC was previously entitled compensation, plus a 10 percent growth factor."[124] and,

7. Its New Market rules allowed two carriers to exchange traffic on a bill-and-keep basis if the two carriers were not exchanging traffic prior to adoption of the ISP Remand Order and the ILEC "has opted into the federal rate caps for ISP-Bound traffic".[125]

Again, the FCC did not draw a distinction between local and non-local ISP-Bound traffic. Rather, the FCC reiterated that the holdings of the ISP Remand Order applied to all ISP-Bound Traffic.

Further, Level 3 argues that the recent FCC's *Starpower* decision supports its positions. In that decision, the FCC confirmed that Verizon must pay intercarrier compensation on ISP-Bound VNXX traffic (rather than having Bill and keep, or having access charges apply to these calls.)[126] Finally, Level 3 points the Commission to the *Virginia Arbitration Order*, in which Verizon's contract terms were summarized as follows:

> Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.[127]

---

[122] *ISP Remand Order* at ¶ 44 (emphasis added).

[123] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03171, FCC 04-241, (rel. October 18, 2004) ("*FCC Core Forbearance Order*").

[124] *FCC Core Forbearance Order*, ¶ 9.

[125] *FCC Core Forbearance Order*, ¶ 9.

[126] *In re Starpower Communications v. Verizon South*, 04-102, EB-00-MD-19, Order (rel. April 21, 2004.)

[127] *FCC Virginia Arbitration Order* at ¶ 286.

The FCC rejected Verizon's attempts to impose a bill and keep regime for FX ISP-Bound traffic:

> We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points. Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[128]

Level 3 argues that, just as the FCC Competition Bureau rejected the ILEC's attempt to impose a bill and keep compensation regime for ISP-Bound FX Traffic, so too should this Commission. In fact, under the FCC's holdings in the ISP Remand Order mandating that only the FCC can establish intercarrier compensation rules for ISP-Bound traffic, the only manner in which the Commission can address the underlying issue raised in this arbitration is to adopt Level 3's proposal to apply a uniform rate of compensation for all traffic.

Level 3 further argues that SBC's handling of a "locally" dialed ISP-Bound call is no different than if the ISP is located across the country – SBC's obligation is to bring the call to the Point of Interconnection. Indeed, every call exchanged between SBC and Level 3 will be exchanged in exactly the same manner no matter if it is FX or not – SBC will transport the call from its switch to the Level 3 POI, and Level 3 will terminate that call to either the same local calling area or a different one. SBC incurs no additional costs for completing an FX or VNXX call than it would any other type of call terminated at the Level 3 POI.[129] Because SBC's costs to bring a call to the POI are the same regardless of the nature of the call, there is no economic justification for treating these calls differently from any other locally dialed call.[130]

Level 3 also provides the Commission with a series of other state Commission orders where the other commissions have reached conclusions similar to the Virginia Arbitration Order and also finding that the FCC has exclusive jurisdiction to address compensation for ISP-Bound Traffic.[131]

---

[128] *FCC Virginia Arbitration Order* at ¶ 301.

[129] Hunt Direct, p. 80.

[130] Hunt Direct, p. 80.

[131] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order, at 7 (Ky. PSC Mar. 14, 2001); *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001), 2001 WL 1335639; *Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation*, Case No. U-12696, Opinion and Order (Mich. PSC Jan. 23, 2001); *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Case No. U-12460, Opinion and Order (Mich. PSC Oct. 24, 2000); *Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related*

The following are our specific findings on the ISP-Bound Services Traffic Intercarrier Compensation provisions of the parties Interconnection Agreement.

With respect to IC Issue 5, The Commission should adopt language that makes clear that ISP-Bound traffic is traffic that is originated over the circuit switched network, and terminated to an ISP customer of the other party. This definition is consistent with the FCC's orders and regulations related to ISP-Bound Traffic.

SBC, in its language in IC Appendix 3.3, imposes a requirement that ISP-Bound Traffic is only applicable in situations where the calling parties (i.e., end user and ISP) are physically located in the same local calling area. This requirement is not consistent with the FCC's *ISP Remand Order*, as neither the word "physical" nor "physically located" appear any where in the Order or the regulations adopted thereunder. In short, SBC creates new requirements that are not even considered under the applicable laws governing ISP-Bound Traffic. Thus, SBC's language is not consistent with the FCC ISP Remand Order.

In addition, Level 3 notes that Footnote 82 of the *ISP Remand Order* specifically states that the call need not terminate in the local calling area in order to be deemed an ISP-Bound call. In response to certain interveners suggestion that the "information access" definition impugns a geographic limitation, the FCC held as follows:

> We reject that strained interpretation. Although it is true that "information access" is necessarily initiated "in an exchange area," the MFJ definition states that the service is provided "*in connection with* the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services" *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). ***Significantly, the definition does not further require that the transmission, once***

---

arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan, Case No. U-12382, Order Adopting Arbitrated Agreement (Mich. PSC Aug. 17, 2000); *Complaint of Glenda Bierman against CenturyTel of Michigan, Inc. d/b/a CenturyTel*, Opinion and Order, Case No. U-11821 (Mich. PSC Apr. 12, 1999); *Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-11-045, A.01-12-026, Opinion Adopting Final Arbitrator's Report With Modification (Cal. PUC July 5, 2002); *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas*, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); *Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket 28906, Declaratory Order (Ala. PSC Apr. 29, 2004); *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award (PUC Ohio Oct. 4, 2001) at 9. *See also*, *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002) (same result); *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities,* Dkt. No. 01-01-29 (Conn. DPUC Jan. 30, 2002) at 41-2; *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001); *Essex Telecom, Inc. v. Gallatin River Communications, L.L.C.*, Docket No. 01-0427, Order (Ill. C.C. July 24, 2002) at 8; *In the Matter of Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin*, Docket 05-MA-130, Arbitration Award (WI PSC Dec. 2, 2002) at 20-21.

handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.

Level 3's language is consistent with the orders and regulations applying to ISP-Bound Traffic. As such, the Commission should adopt Level 3's language in IC Appendix Section 3.3.

IC Issue 6

LEVEL 3 POSITION

In its April 2001 *ISP Remand Order*, the FCC asserted exclusive jurisdiction over compensation issues related to ISP-bound traffic.[132] In the *ISP Remand Order*, the FCC ruled that traffic to ISPs was excluded from the reciprocal compensation requirements of Section 251(b)(5) by operation of Section 251(g) of the Act. This aspect of the *ISP Remand Order* was rejected though not vacated by the D.C. Circuit.

SBC attempts to burden the Agreement with the imposition of an undefined term, "Section 251(b)(5) Traffic". In fact, in Level 3's review of the various FCC regulations and orders related to ISP-Bound Traffic, Level 3 is unaware of and unable to locate any definition of traffic that is associated with the phrase "Section 251(b)(5) Traffic". It appears to Level 3 that SBC's crafting of this new term is SBC's attempt to impose bill and keep arrangements for the exchange of FX or VNXX traffic, and access charges for IP-Enabled traffic.

Level 3 opposes SBC's attempt to impose its own self-serving definition into the agreement, as the use of such undefined term can only lead to confusion and potential disputes in the future as to whether certain types of traffic fall under the scope of SBC's undefined term (and whether access charges are applicable to this unknown traffic). Rather, Level 3 proposes the more accurate term ""Circuit Switched Traffic" with respect to intercarrier compensation. As explained in IC Issue 1, the use of the term Circuit Switched Traffic corresponds with the FCC Orders related to this issue, as the FCC has addressed the appropriate compensation regimes for this type of traffic. As such, the Commission should reject SBC's attempts to impose access charges on any traffic that may fall under SBC's undefined "Section 251(b)(5) Traffic" definition, and accept Level 3's term "Circuit Switched Traffic" in IC Appendix Sections 1.6 and 3.6.

IC Issue 7(a)

LEVEL 3 POSITION

As detailed above, the purpose of intercarrier compensation is to make a carrier whole when traffic originates from and terminates to customers subscribing to each other's services. In an attempt to squeeze every possible nickel of access charges out of Level 3, SBC's language

[132] *ISP Remand Order*, at ¶ 46. Although the U. S. Court of Appeals for the D.C. Circuit remanded the *ISP Remand Order* to the FCC for further consideration, the Court did not vacate the Order, leaving the federal compensation regime in place while the FCC deliberates the issue once again. Accordingly, even though the legal reasoning providing the authority for the FCC to promulgate its federal compensation regime has been rejected, the federal compensation regime itself remains intact and applies in this case.

forces Level 3 to pay access charges on all test traffic on, for instance, 911 trunks when Level 3 is attempting to make sure that its 911 facilities are properly connected to SBC's network.

The issue in IC Issue 7(a) is whether compensation is due for traffic that consists solely of testing connection or equipment connected to the network – i.e., traffic that is not originated from or terminated to a customer. Test calls are not originated from or terminated to either SBC's or Level 3s customers. As such, these calls do not result in the completion of traffic between customers, and should not be included in the intercarrier compensation regime governed by this agreement. In light of this, the Commission should reject SBC's language in IC Appendix Section 3.7, and adopt Level 3's more rationale approach to exempting test calls from the access charge regime.

IC Issue 7(b)

LEVEL 3 POSITION

SBC's language in IC Appendix Section 3.7 provides that the obligation to provide compensation commences "on the date ***the Parties agree*** that the interconnection is complete…" From Level 3's perspective, SBC should have no role in determining when, or if, Level 3's interconnection is complete. In practical effect, under SBC's language, SBC has a role in determining when, or if, Level 3's 911 trunks are interconnected. If SBC deems them not in compliance with the Commission's 911 rules, then it can refuse to compensate Level 3 for the traffic. SBC should have no say in determining whether Level 3 is in compliance with the Commission's rules. SBC is not a regulatory agency like the Commission, nor does SBC have any authority to enforce the Commission's rules. SBC should not be put in a position where it can unilaterally make the determination as to when Level 3 is or is not in compliance with a state regulation, and thus withhold any compensation due Level 3 based on its own self-interested determinations. As such, the Commission should reject SBC's language in IC Appendix Section 3.7, and accept Level 3's more rational approach to prohibiting SBC from withholding compensation when it unilaterally determines Level 3 may not be properly interconnected.

IC Issues 8

LEVEL 3 POSITION

These issues are linked to certain of the Call Record Issues detailed in below, and should be made consistent with the Commission's findings thereto. With respect to Issue 8, Level 3 notes that even SBC admits in its own Petition for a Declaratory Ruling Regarding IP Platform Services that "it would be impracticable, as well as inimical to the technological premise of the Internet, to separate out any discrete, 'intrastate' components of that data stream."[133] If it is impractical to separate out discrete 'intrastate' components of the IP data stream, then why should Level 3 be forced to undertake the crushing time and expense associated with developing these impracticable systems? SBC's proposal is an attempt to add to Level 3's costs of building out its services, and increasing its costs.

[133] SBC Petition at 37-38.

In all of these issues, Level 3 is asking that the Agreement not restrict the parties' ability to negotiate and implement different formats for billing based upon new technologies. Level 3 is not seeking to impose a particular different format, just that the agreement preserve the ability to mutually agree on a different system other than the one SBC desires to be specifically named in the disputed language. In light of these arguments, and the arguments found in the Call Recording issues below, Level 3 encourages the Commission to adopt its language in Intercarrier Compensation Appendix Sections 4.1-4.5, 11.1, 12.1-12.3, 12.5-12.6, and 12.9.

IC Issue 9

LEVEL 3 POSITION

This issue is closely related to the disputed language found in PC Issue 3 below, and should be decided consistent with the Commission's deliberations therein. Level 3 proposes that the Agreement contain the same dispute resolution procedures for ISP-Bound Traffic as with any other sort of traffic. This is a common-sense approach to avoid confusion and litigation in the future as to what form of dispute resolution procedures govern a particular dispute. The parties will be forced to dispute not only the billing error, but also the type of traffic that is the subject of the billing error. Further, there is no legal basis for creating a new dispute resolution process aimed at ISP-Bound traffic. In order to avoid creating disparate processes resulting in confusion in the future, the Commission should adopt Level 3's suggested language in Intercarrier Compensation Appendix Sections 4.7.2.1, and reject SBC's language in Section 5.6.

IC Issue 10

LEVEL 3 POSITION

For the reasons stated in response to IC Issue 6 a and b above, the Commission should reject any attempt by SBC to impose access charges on whatever traffic SBC determines would fall under the penumbra of its undefined "Section 251(b)(5) Traffic" term.

As such, the Commission should adopt Level 3's language in IC Appendix Section 5.0, 5.2, 5.2.1, 5.2.1.1, 5.2.2, 5.2.2.1, and 5.2.2.2.

IC Issue 10(c,d,e)

LEVEL 3 POSITION

The Parties current Agreement requires the Parties to compensate each other for termination of ISP-Bound traffic at $0.0005. However, in light of the *ISP Remand Order,* the parties shall exchange traffic at the rate of $0.0007 per minute of use. The FCC is expected to release its newest *ISP Remand Order* adopting permanent rules on intercarrier compensation for ISP-Bound Traffic soon. In the meantime, the parties shall conform their agreement to reflect a rate of $0.0007 per minute of use, as elected by SBC.

IC Issue 11(a) and 14(c):
GTC DEF Issue 21

LEVEL 3 POSITION

As explained in the section related to IC Issue 5 above, the *ISP Remand Order* states that the call need not terminate in the local calling area in order to be deemed an ISP-Bound call. In Section 7.2 of the IC Appendix, SBC attempts to impose either access charges or bill and keep on FX or FX-like traffic based on SBC's belief that the determining factor in calculating intercarrier compensation is the physical local of the calling parties. As explained, that issue has never been a determining factor in rating a call. Rather, industry standards call for the rating of a call to be based upon the NPA-NXX of the calling parties. In light of the fact that SBC is attempting to impose a compensation regime that is not consistent with the industry standards and the *ISP Remand Order* holdings, the Commission must reject SBC's language in IC Appendix Section 7.2 and 14.1.

IC Issue 11(b)

LEVEL 3 POSITION

In IC Appendix Sections 8.1 and 8.2, SBC attempts to impose terms related too Optional Calling Areas ("OCAs") and Expanded 2-way calling scope ("EAS). Level 3's language clarifies that the compensation for the exchange of OCA traffic under the agreement is limited to Circuit Switched OCA Traffic and is consistent with FCC orders. As explained above, the FCC has held that IP-Enabled Traffic is not Circuit Switched Traffic, but rather is interstate information services, and not subject to access charges. As such, Level 3's language in Section 8.1 segregates the IP-Enabled Traffic Level 3 may have in the OCA from the Circuit Switched Traffic that Level 3 may have, for purposes of intercarrier compensation. As such, Level 3's language in Section 8.1 is consistent with the FCC mandates, and should be adopted.

As for Section 8.2 and 8.3, SBC proposes specific terms relating to the state of the law in Arkansas, Kansas and Texas regarding OCA and EAS. As these jurisdictions may alter or amend their current OCA plans, Level 3 argues that it is more appropriate to accept the state of the law (i.e., the Applicable Law) as it is rather than burden the Agreement with such minutia. As such, the Commission should adopt Level 3s language in IC Appendix Section 8.2, and reject SBC's language in both Sections 8.2, 8.3 and 14.1.

SBC claims that it can use its federal access tariffs to force Level 3 to segregate traffic exchanged between the Internet and the PSTN onto separate trunk groups. Specifically, SBC claims that Section 6 of its federal access tariff (FCC No. 1) requires that Level 3 purchase Feature Group D access trunks for the exchange of information services traffic between SBC and Level 3. However, SBC's tariff does not support such a strained reading. SBC acknowledges that IP-Enabled traffic is information services traffic. The FCC has already specified the interconnection regime that applies to such traffic in its *ISP Remand Order*. On the one hand, compensation for such traffic is the same as compensation for "local" traffic (either at the FCC's $0.0007/minute rate or at state-determined "Section 251(b)(5)" rates). *ISP Remand Order* at ¶¶ 89-94. On the other hand, physical interconnection arrangements for such traffic are exactly the same as apply to any other traffic being exchanged between an ILEC and a CLEC. *ISP Remand Order* at ¶79 n.149; *see also Petition of Core Communications, Inc., Order,* WC Dkt. 03-171 (released October 18, 2004) at ¶5 n.16. Here, SBC seeks to impose special trunking (and compensation) obligations on IP-Enabled traffic. But as noted above, SBC acknowledges that IP-Enabled traffic (of the sort that Level 3 carries) is information services traffic — in this

respect just like ISP-bound calls. There is, therefore, no basis for separate trunking — much less Feature Group D trunking — for this traffic.

SBC's claim that IP-Enabled traffic of the sort Level 3 carries should be handled on Feature Group D trunks boils down to the claim that such traffic is analogous to traditional interstate long distance traffic. In the *ISP Remand Order* the FCC stated that ISP service is analogous, though not identical, to long distance calling service." But the teaching of that order, if nothing else, is that while IP-Enabled traffic might seem like "plain old" long distance traffic in some respects, it is not — and has never been — treated like "plain old" long distance traffic, whether for purposes of interconnection, intercarrier compensation, or otherwise.[134] This distinctive treatment is evident in the *ISP Remand Order,* where, as noted above, compensation is subject to the FCC's special regime, while physical interconnection arrangements are the same as applicable to "normal" Section 251(b)(5) traffic. Nothing about IP-Enabled traffic of the sort carried by Level 3 suggests that any different result is appropriate.

Therefore, according to Level 3, not only is SBC's tariff-based argument unavailing; it actually shows that there could well be fatal defects in SBC's tariff. Other carriers have tried in the past to avoid the requirement to handle the exchange of information services traffic under normal Section 251/252 interconnection arrangements by interposing tariff terms. The courts have concluded that this amounts to an impermissible effort to "game" the system by pretermitting the negotiation/arbitration process mandated by Congress.[135] With respect to tariffs, Congress has enacted a detailed system for governing carrier rates for jurisdictionally interstate communications in Sections 201 through 208 of the Act. Substantively Section 201(b) requires rates terms and conditions to be "just and reasonable," while Section 202 bans unreasonable discrimination. These substantive requirements are implemented via Sections 203 through 208. Section 203 requires that tariffs ("schedules") be filed for all "interstate and foreign wire and radio communications." 47 U.S.C. § 203; *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 229-231 (1994) ("*MCI v. AT&T*"); *AT&T v. Central Office Telephone,* 524 U.S. 214 (1998). Section 204 allows the FCC to suspend filed but not-yet-effective tariffs; places the burden of justifying them on the carrier; and permits retroactive refunds of initially-suspended charges found to be unreasonable. *Southwestern Bell v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999). Section 205 allows the FCC to prescribe changes

[134] The separate and distinctive treatment of IP-Enabled traffic dates back to the very establishment of the access charge regime in late 1983. At that time the general term for such traffic was "Enhanced Service Provider" or "ESP" traffic. The FCC ruled that such traffic — despite being generally analogous to plain old long distance traffic — would be handled quite differently. *See* MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711-15 (1983).

[135] *See, e.g. Global Naps, Inc. v. FCC,* 247 F.3d 252 (D.C. Cir. 2001); *In The Matter Of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, And New England Telephone And Telegraph Company V. Global Naps, Inc*., File No. E-99-22, FCC 99-381 Memorandum Opinion and Order (Rel. December 2, 1999); *See also, FCC Virginia Arbitration Order*, ¶ 592-600 (FCC Wireline Competition Bureau agrees that Verizon's attempt to be able to change prices contained in a negotiated interconnection agreement by virtue of filing a tariff for analogous services constituted an impermissible use of a tariff to circumvent the 251 and 252 process and therefore should be prohibited.).

to existing tariffs, but only prospectively. *Illinois Bell v. FCC*, 966 F.2d 1478, 1481 (D.C. Cir 1992). Section 206 establishes carrier liability for damages due to their violations of the Act. *MCI Telecom. Corp. v. FCC,* 59 F.3d 1407, 1413 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1240 (1996). Section 208 directs the FCC to adjudicate such claims. *AT&T v. FCC,* 978 F.2d 727, 732 (D.C. Cir. 1992), *cert denied,* 509 U.S. 913 (1993).

Consistent with this detailed statutory design, the FCC has promulgated extensive rules applicable to federal tariffs, primarily in Part 61 of the FCC's rules. Primary among tariff requirements is clarity. "In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2. There is no question that SBC's tariff does not meet this basic standard in the context of IP-Enabled traffic. Nowhere does this tariff clearly and explicitly apply its rates and regulations to information services traffic of any sort. Moreover, by definition, it could not do so. In addition to trying to avoid its obligations under Section 251/252 with respect to Level 3, and in addition to ignoring the FCC's specific rules regarding interconnection and compensation for "information access" traffic, in its tariff argument SBC, basically, is trying to argue its way out of the well-settled rule that enhanced service providers are not carriers, but rather customers under federal law. ***If*** its tariff can be interpreted to cover information services traffic, then the tariff conflicts with this well-established body of law and is invalid. If the tariff cannot be interpreted this way, then SBC's argument is simply wrong. Finally, if it isn't clear — maybe the tariff applies, maybe it doesn't, you just can't really tell — then the tariff is invalid, and possibly even *void ab initio*, because it is vague and unclear.[136] Under ***no*** scenario, however, is SBC's tariff argument actually correct.

IC Issue 12

LEVEL 3 POSITION

SBC proposes language related to the Intercarrier Compensation for Unbundled Local Switching Traffic. This issue will most likely be decided upon the Commission's deliberations related to UNE Issue 1 below. For purposes of consistency, Level 3 believes the Commission should not adopt SBC's language as the Interim Order adopted by the FCC maintains the status quo for UNEs that existed as of June 15, 2004. Once the FCC's final rules are in place, the parties can use the Change in Law provisions of the agreement to modify the terms to address all UNE issues, including IC Issue 12. For this reason, the Commission should reject SBC's attempts to litigate UNE issues in this arbitration, and reject SBC's language in Intercarrier Compensation Appendix Sections 5.7, 5.7.1-5.7.4.

IC Issue 13

LEVEL 3 POSITION

[136] *See In The Matter Of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, And New England Telephone And Telegraph Company V. Global Naps, Inc*., File No. E-99-22, FCC 99-381 Memorandum Opinion and Order (Rel. December 2, 1999)..

For the same reasons as discussed in IC Issue 10(c), (d) and (e) above, the Commission should make clear that the current ISP Compensation terms will remain in place until the FCC releases its *ISP Remand Order*. At that time, the parties can incorporate the FCC's findings into the agreement, without the need to invest in time or resources for a new ISP compensation plan that will only be in place a short while. The wiser course is for the Commission to hold the status quo until the FCC order is released and the parties can incorporate the terms into the agreement.

Level 3 also notes that certain of the FCC proposed language relating to ISP-Bound Traffic in New Markets (Section 6.4) and Growth Cap and New Market Bill and Keep Arrangements (Section 6.5) have been made null and void by the FCC's recent *Core Forbearance Order*. In that Order , the FCC announced that it would not apply certain of its findings from the *ISP Remand Order*. Specifically, the FCC held that the Growth Cap and New Market Rules adopted in the *ISP Remand Order* that imposed a bill and keep regime for ISP-Bound traffic "are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory."[137] These are the very same provisions in the *ISP Remand Order* upon which SBC relies in presenting its language in Sections 6.4 and 6.5 of the IC Appendix. SBC's attempts to inject such terms in the IC Appendix are clearly without merit, as demonstrated by the FCC's *Core Forbearance Order*.

For these reasons, the Commission should reject SBC's language in IC Appendix Section 6, 6.1, 6.2, 6.2.1, 6.2.2, 6.2.3, 6.3, 6.3.1, 6.3.2, 6.3.3, 6.4, 6.4.1, 6.4.2, 6.5, 6.5.1, 6.5.2, 6.6, 6.6.1,6.7 and 7.5.

IC Issue 14

LEVEL 3 POSITION

As detailed above in IC issues 1 and 2, the FCC issued its ruling in the *Pulver.com* and *AT&T IP* proceedings. Consistent with the FCC's findings in those proceedings related to the application of access charges to IP-Enabled Traffic, Level 3's proposed language comports with the FCC holding that Telecommunications Traffic that is governed by the terms of the Parties' tariffs will be governed by those tariffs, subject to Applicable Law. IP-Enabled Traffic is categorized by the FCC as information services and not subject to access charges because the traffic undergoes a net protocol conversion (i.e., IP-PSTN traffic).

The net effect of SBC's language is to improperly apply access charges on Level 3's IP-Enabled Traffic, which is in direct conflict with the FCC's findings in the above cited cases. In light of that fact, the Commission should reject SBC's language in IC Appendix Section 7.1, and adopt Level 3s sustainable proposal.

IC Issue 15

LEVEL 3 POSITION

[137] *FCC Core Forbearance Order*, ¶ 24.

SBC's language in Sections 7.4 and 7.5 of the IC Appendix assumes that ISP-Bound traffic can be treated as if it was rated as either a local or toll call. The FCC's *ISP Remand Order* precludes re-rating such ISP-Bound Traffic. Per the FCC's determinations in the *ISP Remand Order*, ISP-Bound Traffic is interstate traffic subject to a single form of compensation. As SBC has opted into the FCC ISP compensation regime pronounced in the *ISP Remand Order* in all states but Connecticut, and applying the single form of compensation, SBC's language in Sections 7.4 and 7.5 is inapplicable. The Commission must reject SBC's attempts to recast the FCC's findings in the *ISP Remand Order*, and reject SBC's language in IC Appendix Sections 7.4 and 7.5.

IC Issue 16

LEVEL 3 POSITION

This is a Missouri-specific issue and need not be addressed by this Panel.

IC Issue 17

LEVEL 3 POSITION

This issue is directly related to IC Issue 4 above. For the reasons stated therein, the Commission must adopt Level 3s language in IC Appendix Section 10.1.

ITR Issue 18(a)

LEVEL 3 POSITION

This issue is directly linked to IC Issue 8 above. SBC's definition of Switched Access Traffic, as presented in ITR Appendix Section 12.1, should not be included in the agreement. SBC's definition imposes a requirement that the definition include traffic that originates from the end user's premises in IP format and is transmitted to the switch of a voice communications provider when such switch utilizes IP technology, also known as IP-PSTN. To top it off, once SBC has deemed Level 3's traffic as Switched Access Traffic, the traffic is subject to SBC's access charges.

SBC's attempt to lump IP-Enabled Traffic into the definition of Switched Access Traffic is contrary to federal law, and an attempt by SBC to puff its access revenues with an additional source of funding. As explained in the discussions related to Intercarrier Compensation, there is no FCC order, rule or regulation that concludes that Level 3 should pay access charges when an SBC customer terminates a call to a Level 3 IP customer. Just the opposite. In the *Worldcom Order*, the US Court of Appeals for the District of Columbia held that Section 251(g) of the Act preserves the pre-1996 Act access charge rules. Because there was no pre-1996 access charge rule governing intercarrier compensation for IP-Enabled service traffic, such traffic must be exchanged at cost-based rates pursuant to Section 251(b)(5) of the Act.

In light of these facts, SBC's attempts to lump IP-Enabled Traffic into its misguided definition of Switched Access Traffic, done in an attempt to impose access charges on Level 3's traffic, violates federal law. The Commission must reject SBC's language in ITR Appendix 12.1, and ensure that IP-Enabled Traffic is not subject to any form of access charge.

IC Issue 18(b)

LEVEL 3 POSITION

As detailed above, Level 3 does not believe that either party contests the fact that an SBC end user calling a Level 3 end user across the street, or anywhere in the SBC local calling area for that matter, would result in Level 3 assessing SBC reciprocal compensation for terminating that SBC call. Under the rating guidelines in effect for years, the rating of a particular call is based upon the NPA-NXX''s of the calling parties. As a "local" NPA-NXX, the call is deemed local in nature and subject to reciprocal compensation.

The same is true of any 8YY call that is local in nature – i.e., the NPA-NXX associated with a particular 8YY number is assigned to a local calling area. In these situations, the call must be deemed "local" in nature, and subject to the reciprocal compensation requirements imposed on any other local call. As discussed in detail above, historically the industry standard has been that the determination as to whether a particular circuit switched TDM call is local or non-local is based upon the NPA-NXX of the calling parties. If the NPA-NXX indicates that the call is terminating at a customer within the local calling area, then the call is local in nature and subject to the appropriate reciprocal compensation. If the NPA-NXX comparison shows termination of the circuit switched TDM call is at a non-local customer, then the call is access traffic. At no point in time has the physical location of the calling parties been a determinative factor in the rating for that call. SBC's proposal replaces this time-honored rating methodology with a vast new one relying on the physical location of the calling parties.

Further, as also described in detail above, with IP-Enabled Traffic, the physical location of the calling parties is not relevant. Rather, as in the case with circuit switched TDM compensation in the past, the NPA-NXX of the calling parties will determine the rating of a call. This is precisely the regime recommended by Level 3, and the Commission should adopt Level 3's proposals in IC Appendix Section 11.2.

IC Issue 19(a)

LEVEL 3 POSITION

This issue is directly linked to IC Issue 8 above, and should be decided accordingly.

IC Issue 19(b)

LEVEL 3 POSITION

As detailed above in IC issue 1, the FCC just issued its ruling in the *Pulver.com* and *AT&T IP* proceedings. Consistent with the FCC's findings in those proceedings related to the application of access charges to IP-Enabled Traffic, Level 3's language that comports with the FCC holdings related to Circuit Switched Traffic and Meet Point Billing. Under the FCC's *Pulver.com* and *AT&T IP* orders, the FCC has held that IP-Enabled Traffic is not Circuit Switched Traffic. Rather IP-Enabled Traffic is interstate information services, not subject to access charges. Level 3's language accounts for the fact that IP-Enabled Traffic undergoes a net

protocol conversion (i.e., IP-PSTN traffic), making it a non-Circuit Switched form of information service, and not subject to access charges. For compensation of Circuit Switched Traffic, Level 3 proposes that it be governed by a Meet Point Billing basis.

The net effect of SBC's language applying Switched Access Traffic is to attempt to apply access charges on Level 3's IP-Enabled Traffic, which is in direct conflict with the FCC's findings in the above cited cases. In light of that fact, the Commission should reject SBC's language in IC Appendix Sections 12.1, 12.2, 12.3, 12.5, 12.6 and 12.9, and adopt Level 3s legally sustainable proposal.

IC Issue 20

LEVEL 3 POSITION

As detailed above in IC issues 1 and 19(b), the FCC has held that IP-Enabled Traffic is not circuit switched traffic, but rather is a non-Circuit-Switched form of information service, and not subject to access charges. Level 3's language is a more accurate reflection of the FCC's findings on rating of IP-Enabled Traffic. As such, the Commission should adopt its language in IC Appendix Section 14.1, which incorporates the results of the FCC's holdings discussed herein and follows the FCC's rules on net protocol conversion. SBC's attempts to lump these IP-Enabled (information) services into SBC's access tariffs and rate regime is inappropriate and contrary to the FCC's mandates.

IC Issue 21

LEVEL 3 POSITION

Much as with IC Issues 19(b) and 20 above, the underlying issue here is the fact that IP-Enabled Traffic is not Circuit Switched traffic and not subject to any access charges. Thus, the Agreement should ensure that the billing arrangements and terms for circuit switched services should not bleed over to IP-Enabled services and traffic. Level 3's language provides for clear segregation of IP-Enabled Traffic from Circuit Switched Traffic for purposes of intercarrier compensation, thus creating a more clear, better defined agreement.

IC Issue 22

LEVEL 3 POSITION

SBC's proposed Reservation of Rights language proposes section upon section of minutia detailing SBC's view of the world with respect to the impact of the FCC's *ISP Remand Order* and the related *WorldCom* decision remanding that proceeding. To be clear, Level 3 is not opposed to including a Reservation of Rights section in the Agreement. Level 3 notes that the agreed upon language in Section 18.1 of the IC Appendix provides for such a Reservation of Rights, and more than adequately protects either parties' interests with respect to the pending FCC ISP Remand proceeding – explicitly noting that "neither carrier waives any rights, and expressly reserves all rights, under the *ISP Compensation Order* or any other regulatory, legislative or judicial action". In Level 3's view, this simple statement is all that needs to be said.

This is especially true in light of the fact that the FCC is expected at any time to release its order in the ISP Remand proceeding. Level 3 is proposing that the Parties' agree to implement whatever compensation regime the FCC adopts in that order. At that time, if necessary, the Change in Law provisions will kick in and the Parties can negotiate appropriate language to incorporate into the Agreement that will adopt the FCC's findings.

SBC's proposals, however, take the concept to its most extreme. SBC attempts to impose its own interpretations of the legal actions, impose those interpretations on Level 3, and present them to the Commission as a "joint" acknowledgement of the status of the legal landscape. Level 3 cannot, and indeed will not, accept any language that imposes SBC's view of the world on it. For instance, SBC's section 18.2 requires that Level 3 agree to pay and bill Intercarrier Compensation for ISP-Bound Traffic at the rates, terms and conditions specified in Section 6.0 through 6.6 of the IC Appendix. However, IC Appendix Sections 6.0 through 6.6 are sections to which Level 3 has disputed as not consistent with the law and not appropriate in light of the *Core Forbearance Order.* In other words, SBC is attempting to have Level 3 agree to language which incorporates other sections to the Agreement of which it disagrees.

Rather than burden the agreement with SBC's endless expression of its concerns related to the *FCC ISP Remand Order*, the more cogent option is to adopt the agreed-upon language in Section 18.1 that reserves the parties' rights, and leave it at that. SBC's language will only lead to confusion and disputes. As such, Level 3 encourages the Commission to adopt its more reasonable approach to the Reservation of Rights language in Intercarrier Compensation Appendix, Section 18.1.

V. ISSUES IN THE UNBUNDLED NETWORK ELEMENTS APPENDIX.

UNE Issue 1

LEVEL 3 POSITION

Level 3 proposes to have the Commission adopt *en toto* the parties' existing terms and conditions for the provision of unbundled network elements. Level 3 basis its position on the recent *Interim Order*[138]*,* adopted by the FCC. Consistent with the terms of the FCC's *Interim TRO Order,* the Commission must retain the terms and conditions found in the current ICA between the Parties until the FCC adopts permanent unbundling rules or March 12, 2005, whichever is earlier. According to Level 3, 'BC's terms and conditions for the availability of network elements that are either inconsistent with the applicable law, or are being considered by the FCC. The FCC's *Interim Order* "froze" the legal status of the availability of network elements until after the FCC reaches a conclusion on its rulemaking proceeding.

138 *Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, WC Docket No. 04-313, FCC 04-179 (rel. August 20, 2004) ("Interim TRO Order").

The Commission should reject SBC's terms and conditions for the availability of network elements. [139] SBC proposes to "declassify" a number of UNEs, claiming that the *USTA II* court vacated several of the FCC's rules that were adopted in the *TRO*.[140] SBC's contract terms should not be adopted not only because of the *Interim Order*, but also because SBC's proposed terms mischaracterize the legal status of those UNEs.

The FCC's *Interim TRO Order*, which took effect on September 13, 2004 requires Incumbent Local Exchange Carriers ("ILECs"), including SBC, to provide access to network elements, including mass market local circuit switching, enterprise market loops (*i.e.*, DS1 and higher capacity loops) *and* dedicated transport under the same rates, terms and conditions that applied under SBC's interconnection agreements and tariffs as of June 15, 2004.[141] Therefore, the *Interim Order* establishes, on an interim basis, federal requirements that maintain the status quo with respect to the federal unbundling obligations of ILECs as they existed in interconnection agreements and tariffs as of June 15, 2004. As a result, SBC is required under federal law to provide access to the terms and conditions of the parties Interconnection Agreement, as those terms existed on June 15, 2004, until March 13, 2005, which is six months after the *Interim Order* was published, or until the FCC's permanent federal unbundling rules become effective, whichever date is sooner.

The *Interim Order* determined that Level 3 and SBC may not arbitrate the terms for accessing unbundled network elements until the FCC adopts permanents rules: "Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights *by seeking arbitration of new contracts*, or by opting into other carriers' new contracts. ***The interim approach adopted here, in contrast, does not enable competing carriers to do either***."[142] According to the FCC, "such litigation would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible."[143] The FCC recognizes that "[t]he imposition of entirely new interim requirements," such as those that any state commission might impose, "[c]ould lead to further disruption and confusion that would disserve the goals of section 251."[144]

Given the FCC's directive, Level 3 contends that this Commission is prohibited at present from adopting any UNE terms and conditions applicable to switching, enterprise loops and dedicated transport, beyond that which was in place as of June 15, 2004. Thus, appropriately, Level 3 proposes in this arbitration, consistent with the FCC's *Interim Order*, continuing the current UNE terms and conditions of the existing ICA between the Parties that were valid and effective as of June 15, 2004. In its *Interim Order*, the FCC stated:

---

139 Testimony of Michael D. Silver, SBC California at 8, 11 ("Silver Testimony"): SBC Witness Silver claims as follows: "SBC's proposal ensures that Level 3 will continue to have access to the items listed in the Interim Order during the limited period in which Level 3 allegedly is entitled to such access." Silver Testimony at 13.

140 Silver Testimony at 1, 8-10.

141 *Interim TRO Order* ¶¶ 1, 21, 29.

142 *Interim TRO Order* ¶ 23 (emphasis added).

143 *Id.*¶ 17.

144 *Interim TRO Order* ¶ 36.

> . . . we set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

Of significance, on October 6, 2004, the D.C. Circuit issued an order to *hold in abeyance* until January 4, 2005, a petition for mandamus filed by several ILECs that sought to overturn the interim network unbundling rules established in the Interim Order.[145] Thus, by its refusal to grant the mandamus petition and instead to allow the FCC the time within which to issue its permanent unbundling rules by years' end, it can be readily inferred that the Court found no substantive problems with the FCC's transition scheme, otherwise, presumably, it would have issued a preemptive ruling.

After the FCC adopts rules that will identify the network elements that must be unbundled, SBC may serve an appropriate notice to Level 3 to start the dispute resolution process to amend the Parties' current terms and conditions for all disputed UNEs.[146] If the Parties are unable to agree on the appropriate amendments to the existing agreement, the Parties may engage in dispute resolution, pursuant to the terms of their ICA. To do so is, in the words of the FCC, a "wasteful" exercise,[147] and would only serve to subvert the primary intent of the one-year transitional regime set forth by the FCC in the *Interim TRO Order*, which is designed to provide a reasonable timeframe for the FCC to complete its work while interim protections for competitive carriers remain in place.[148]

VII. ISSUES IN THE GENERAL TERMS AND CONDITIONS APPENDIX

ISSUE GTC 1

LEVEL 3 POSITION

Any requirement related to the Parties providing an assurance of payment should be based on a state specific criteria directly related to the payment history for the specific state in

145 *United States Telecom Association v. Federal Communications Comm'n*, No. 00-1012 (D.C. Cir. Oct. 6, 2004)

146 Hunt Direct, p. 60.

147 Hunt Direct, p. 58 (citing *Interim TRO Order* ¶ 17).

148 *Id.*

which the assurance is sought.[149] In contrast, under SBC's terms, in the improbable event Level 3 purportedly fails to pay a bill in a timely manner, even if that bill is for services rendered in a different state, SBC could require deposits in *every* state in which the Parties' do business.

SBC should be permitted to limit its financial exposure, but Level 3 disagrees with SBC's method of accomplishing this goal. Level 3 believes that it's position – that assurances of payment be based upon state specific eligibility – fully allows SBC to protect itself from CLECs that do not pay, and in no way impairs that objective. Level 3's provisions protect against SBC's ability to take a problem that may arise in one state and hold it over Level 3 like a club in every state in which the Parties interact. While SBC's operations are region-wide, operations of the Parties in each state are governed by the specific guidelines, rules and regulations in place in that state. The Parties' operation in each state are unique and an arbitrary and unnecessary interdependence should not be created based on SBC's recommendation. SBC's approach creates an unfounded inter-dependence between state operations.

Importantly, Level 3's proposal does not remove SBC's ability to seek an assurance of payment. Rather, Level 3's language takes a common sense approach that links such assurances with the failure to pay for services rendered in that specific state. Also, there are many reasons why a particular bill may be unpaid, including disputes that involve particular state law issues. If Level 3 disputes that bill for a state-specific reason, SBC should have no claim to disconnect customers in other states for failing to provide SBC with some assurance of payment.

In addition, the FCC's deliberations on this issue support Level 3's position. In its *Verizon Policy Statement*,[150] the FCC determined that deposit policies similar to those proposed herein by SBC are overly broad, "imposing undue burdens on access customers . . . ."[151] Even acknowledging the impact of telecommunications industry bankruptcies, the FCC nonetheless concluded that concerns over an increased risk of nonpayment did not outweigh the potential harm to carrier customers. The same is true of the issue facing this Commission – the rationale for SBC's language does not outweigh the potential harm to the customers. For these reasons, the Commission should maintain state specific assurance of payment criteria and adopt Level 3's proposed changes in GTC Appendix Section 7.2, 7.2.1, 7.2.3, 7.3.2.

ISSUE GTC 2

LEVEL 3 POSITION

Level 3 maintains that the Agreement should provide it with appropriate protections against possible SBC unilateral demands for assurance of payments with little or no business justification.[152] Level 3 proposes that SBC may only seek an assurance of payment if Level 3 has received more than two valid past due notices for undisputed amounts billed by SBC within the prior twelve months on in that specific state. This proposal requires SBC to take into account

[149] Mandell Direct, p. 6.

[150] *Verizon Petition for Emergency Declaratory and Other Relief*, Policy Statement, WC Docket No. 02-202, FCC 02-337 (rel. December 23, 2002) ("*Verizon Policy Statement*").

[151] *Id.* at ¶ 6.

[152] Mandell Direct, p. 8.

Level 3's positive past payment history. However, if Level 3 is unable to maintain a positive past history of payment, then SBC can justifiably seek an assurance of payment.

SBC relies heavily on the theory that services are being provided "on credit," as if the industry norm that payment for services occurs after rendering somehow justifies extraordinary allowances on SBC's behalf. All carriers receive payment after services are provided, and all carriers face risks and rewards similar to those faced by SBC – including Level 3. SBC states that at least twelve (12) consecutive months of timely payments demonstrates "an ability and a willingness to pay throughout the entire business cycle."[153] While this may be true, Level 3's language provides the same assurances, while permitting carriers that have not yet established a year-long business relationship with SBC to not begin the relationship at a disadvantage by having to provide assurances of payment when no indication exists that the carrier is not a financially stable entity.

The FCC has made policy statements that support Level 3's position on Issue No. GTC-2. The FCC recommended in its *Verizon Policy Statement* that interstate access tariffs should be revised "to define the proven history of late payment trigger for requiring a deposit to include a failure to pay the undisputed amount of a monthly bill ***in any two of the most recent twelve months***, provided that both the past due period and the amount of the past due delinquent payment are more than *de minimus*."[154]

In the *Verizon Policy Statement* the FCC was addressing a deposit requirement with respect to interstate access charges, though the principles are equally applicable here. If the CLEC is able to demonstrate a positive payment history in a particular state, then a deposit is not appropriate. The FCC chose to utilize the same bar Level 3 proposes to determine when deposits are appropriate - a demonstration that the CLEC has failed to pay undisputed sums in any two of the most recent twelve months. Further, the Commission must remember that Level 3 has proven its financial and technical abilities in order to be certified as a telecommunications carrier in this state. SBC should not be able to put itself in a position that is superior to that of the Commission by making independent determinations of financial liability.

An assurance of payment reduces Level 3's flexibility to use its capital for its own business purposes and it has a negative impact on the Level 3 balance sheet. Level 3 sees its proposal as not only supporting the FCC's policy statements, but a reasonable compromise to alleviate SBC's concerns. Level 3's language places a reasonable restriction on SBC's ability to seek an assurance of payment and balances the interests of both Parties and Level 3's customers. For the reasons outlined above, the Commission should adopt Level 3's proposed changes to Sections 7.2 and 7.2.1.

ISSUE GTC 3

LEVEL 3 POSITION

[153] Egan Direct, p. 12.

[154] *Verizon Policy Statement* at ¶ 26.

As stated with regard to Issue No. GTC-2, Level 3 maintains that the Agreement should provide it with appropriate protections against possible SBC unilateral and unwarranted demands for assurance of payments. As such, Level 3 proposes that any financial impairment for which assurances of payment might be demanded should be based upon "significant and material" impairment such that any minor change to Level 3's "established credit, financial health, or credit worthiness" would not subject Level 3 to immediate demands for assurances of payment by SBC.

SBC alleges that the phrase "significant and material impairment" creates unnecessary confusion and an "obvious invitation to disputes."[155] Level 3 disagrees and asserts that just the opposite result would occur. Level 3's language provides clarity and a precise understanding of the level of impairment that will be deemed weighty enough to justify the imposition of assurances of payment. It is the lack of such clarity as SBC proposes that would lead to confusion and an "obvious invitation to disputes."

In support of its position, Level 3 refers to the *Verizon Policy Statement*, where the FCC held that "[b]road, subjective triggers that permit the incumbent LEC considerable discretion in making demands, such as a decrease in 'credit worthiness' or 'commercial worthiness' falling below an 'acceptable level' are particularly susceptible to discriminatory application."[156] Level 3 drafted the proposed language to encapsulate the FCC's position. As such, Level 3 proposed that in order to demand assurance of payment, SBC must meet the minimal threshold showing that Level 3's financial status has "significant and material" impairment. Without such a threshold safeguard, the Agreement will not protect Level 3 from unilateral and improper demands for assurance of payment, contrary to the FCC's announcements in the *Verizon Policy Statement*.

In addition, SBC contends that the baseline for determining impairment should be set at August 1, 2004. Level 3 disagrees and states that it should be the Effective Date of the agreement. Prior to the Effective Date, the Parties have no obligation to each other under the Agreement. It is only after the agreement takes effect that any changes in Level 3's credit worthiness is of import to SBC and should be considered for purposes of protecting SBC's revenue. On this basis, Level 3 asks that the Commission to adopt Level 3's proposed changes to Sections 7.2 and 7.2.2.

ISSUE GTC 4

LEVEL 3 POSITION

There should be no question that SBC must comply with the presentation of invoices and dispute resolution requirements of the Agreement. Level 3's desire to add clarification that adherence to these requirements – on both the part of Level 3 and SBC - influence the demand for assurances of payment in no way creates "vagueness" or "uncertainty," as stated by SBC,[157] but rather ensures that accountability is tied to requests for assurances of payment.

[155] Egan Direct, p. 15.

[156] *Verizon Policy Statement*, ¶ 21.

[157] Egan Direct, p. 19-20.

The Agreement must make clear that neither Party can unilaterally terminate service or demand assurance of payment without first following the prerequisite, applicable contractual and legal procedural requirements contained therein. Thus, Level 3 proposes the common-sense approach that prior to demanding an assurance of payment, SBC must provide Level 3 with notice of deficiency by adhering to the invoice and dispute resolution terms in the Agreement. Level 3 believes that if SBC is not clearly required to adhere to the invoice and dispute resolution terms of the Agreement prior to demanding an assurance of payment, then Level 3 will not receive sufficient notice, nor be given the opportunity to correct the problem.[158] As such, the Commission shall adopt Level 3's common-sense proposals in Section 7.2.3.

ISSUE GTC 5

LEVEL 3 POSITION

Level 3's position is consistent in that its seeks to protect against SBC's potential to unilaterally impose an assurance of payment with little or no justification. Issue GTC 5 is a perfect example of such a possibility. As a matter of fundamental fairness, if the Agreement is going to contain terms and conditions upon which SBC can demand Level 3 make assurance of payments, then the Agreement must also allow Level 3 to have the parallel opportunity to dispute the reasonableness of that demand.[159] Level 3 proposes language that would give it such an opportunity to dispute the reasonableness of the demand for an assurance of payment, but specifically limits when Level 3 can make such a dispute to those instances in which it has a good-faith and bona fide basis to dispute.[160] Thus, under Level 3's language, SBC is still able to make an assurance of payment demand, but Level 3 would have the ability to protect itself from unfounded demands when it has a good-faith and bona fide basis for doing so.

In addition, SBC contends that its language is in Level 3's favor because it prevents SBC from immediately terminating service, rather providing Level 3 with ten (10) days to respond to the demand for assurances of payment.[161] Although SBC cannot "imagine why Level 3 would oppose SBC language,"[162] it is not clear from its language exactly what its intent may be. Indeed, if SBC's language does as it contends, then the Parties language serves the same purpose and will achieve the same goal. However, Level 3's proposition is more clearly articulated and more rationally imposes protections for both Parties. For these reasons, Level 3 asks that the Commission uphold such a basic threshold by adopting Level 3's language in Sections 7.8 and 7.8.1.

ISSUE GTC 6

LEVEL 3 POSITION

[158] Mandell Direct, p. 12.

[159] Mandell Direct, p. 14.

[160] Mandell Direct, p. 14.

[161] Egan Direct, pp. 24-25.

[162] Egan Direct, p. 25.

Level 3 proposes language in GTC Appendix Section 8.8.1 that requires the billing party (either Level 3 or SBC) to comply with all of the procedures set forth in the Agreement "and otherwise set forth in applicable law." SBC contends that Level 3 should bring any pertinent applicable law to the Commission's attention now and include any such applicable law in the Agreement.[163] What SBC chooses to ignore is the reality that "applicable law", particularly as it relates to the telecommunications industry, is in a perpetual state of flux. As such, no agreement can fully incorporate or allow for the changes that may occur in the law at some point in the future, yet the Parties still remain responsible for reflecting those changes and adhering to them under Level 3's proposal. Level 3's language clarifies that both Parties must comply with all of the billing procedures laid out in the Agreement, as well as any other applicable law, as that term is defined in the Agreement.[164] This basic acknowledgment of the impact of applicable law on the billing obligations is routine and, as such, The Commission should adopt Level 3's proposal in Section 8.8.1.

ISSUE GTC 7

LEVEL 3 POSITION

SBC should not be permitted to disconnect all services utilized by Level 3 (in *any state* in which Level 3 may be providing service) in the unlikely event that Level 3 does not pay an undisputed, billed amount. Level 3 believes that permitting SBC to disconnect any and all services or products purchased by Level 3 for an alleged failure to pay undisputed amounts for only a subset of those services is extreme. Instead, Level 3 proposes that SBC only be allowed to disconnect the specific service or products for which Level 3 has failed to pay the undisputed amount.

Level 3's language in Section 9.2 seeks to protect its customers from discontinuance of services that are not part of an unpaid bill. Level 3's customers should not have to suffer the loss of service in the event that charges are unpaid for unrelated services. In contrast, the result of SBC's proposal would be to leave Level 3 at risk of losing its customer base subject to SBC's over reaching.[165]

The interconnection arrangements between Level 3 and SBC are complex, and and this Commission are aware of the complexity of billing disputes between ILECs and CLECs. There are numerous reasons why a particular bill may be unpaid, including disputes that involve particular network elements, particular rates assessed, collocation facilities, and/or interconnection arrangements. There may be a pending proceeding that would have an effect on Level 3's obligation to pay a bill for a particular unbundled network element that the Parties have not yet agreed on how to handle. If Level 3 fails to pay a bill for a particular service or network element, SBC should have no claim to disconnect any other of Level 3's services. All obligations relating to payment should be service-specific.

[163] Egan Direct, p. 27.

[164] Mandell Direct, p. 15.

[165] Mandell Direct, p. 16.

Furthermore, Level 3 needs at least thirty days in order to perform the necessary internal analysis and audit to respond to the unpaid charges notice. Thirty days will allow the Parties to internally perform a more thorough investigation of the problem, work together informally, and help avoid unnecessary formal actions and/or litigation. Level 3's language in Section 9.2 is beneficial to the Parties, as well as this Commission, and should work to avoid unnecessary disputes. As such, Level 3 asks that the Commission adopt Level 3's language in GTC Appendix Section 9.2.

ISSUE GTC 8

LEVEL 3 POSITION

Level 3 has sought 30 days to adequately respond to a notice of unpaid charges. Thus, Level 3's language in Section 9.3 and its subparts provides that the Parties allow for thirty calendar days following receipt of the notice of unpaid charges before a formal dispute can be filed. SBC offers a far more limited ten business day interval, although it states that "ideally" notice of a formal dispute would be filed before the payment due date.[166]

As previously stated, Level 3 believes that thirty calendar days is a more practical period of time during when the Parties may investigate, audit, negotiate and settle the dispute prior to triggering the formal dispute resolution terms in the Agreement. SBC's proposed ten business day period does not allow the Parties adequate time for such discussions, and will only result in the disputing party invoking the dispute resolution terms of the Agreement, unnecessarily, in order to preserve their rights under the agreement. Level 3's proposal is reasonable, and less burdensome on the Parties, as well as the Commission – allowing for informed negotiation and resolution, Further, in the event the parties cannot resolve all of their issues, the 30 days also provides an opportunity to limit the number of issues that will have to be brought before the Commission in the event of a formal dispute.

In light of these facts, Level 3 encourages the Commission to adopt its proposed thirty-day timeframe as detailed in GTC Appendix Sections 9.3, 9.3.1, 9.3.2, 9.3.3, 9.3.4.

ISSUE GTC 9

LEVEL 3 POSITION

GTC Issue 9(a). Level 3 should not be precluded from submitting, and SBC accepting and acting upon, new or pending orders on the day that SBC has sent out a second late payment notice. SBC contends that it would be "just not reasonable" to require SBC to continue accepting and processing orders when a second late notice for undisputed unpaid amounts is being issued. The problem here is twofold. First, the second notice may have not yet been received by Level 3. Second, the final date prior to termination contained on the second notice has not passed. In essence, SBC wants to preemptively terminate provisioning prior to that cut-off date.

[166] Egan Direct, p. 34.

Further, this approach is contrary to Level 3's endeavors to minimize formal disputes by permitting the parties adequate time to resolve any issues that may arise. As described in Issue GTC-8, Level 3 is proposing that the billed party have an additional thirty calendar days after receipt of the notice of late payment prior to formalizing the dispute. As such, unless and until the dispute is formally invoked, SBC should be precluded from freezing Level 3's orders.[167]

GTC Issue 9(b). In the unlikely event that Level 3 fails to pay an undisputed amount, Level 3 proposes that SBC only be allowed to disconnect the specific service and/or products for which payment has not been made. This position is consistent with Level 3's position in GTC Issue 7 above. SBC proposes that if billed amounts continue to go unpaid, that SBC should be permitted to terminate any and all of the services/products provided to Level 3. SBC's language results in placing Level 3 customers at an unfair disadvantage, subject to discriminatory treatment by SBC.

For the reasons stated above, as well as those stated in Issue GTC-7 above, Level 3's language in GTC Sections 9.5.1, 9.5.1.1, 9.5.1.2, 9.6.1.1, 9.6.1.2, 9.7.2.2 is reasonable and shall be adopted.

ISSUE GTC 10

LEVEL 3 POSITION

Level 3 does not see the benefit of allowing SBC's one-sided opinions of regarding intervening law into this Agreement. SBC's proposal seeks to include voluminous language referring to specific FCC Orders and Court rulings in the intervening law section of the agreement. SBC's language incorporates its own, biased legal conclusions pertaining to the findings of those cases and the thrust of the orders.[168] Level 3 believes that the state of the law at the time of the Effective Date is what it is, and that SBC's language buries the Agreement in minutia that is unnecessary and will only lead to confusion. SBC's language is a confusing, distorted attempt to list every case that could, may or might impact any of the terms of the Agreement in SBC's favor. If the particular case impacts the terms of the Agreement such that SBC believes that it qualifies as an Intervening Change in Law in any particular jurisdiction then it can, and should, give the appropriate notice to Level 3. The same is true for Level 3. To burden the Agreement with such confusing and unnecessary minutia creates uncertainty and the potential for future litigation as the Parties dispute the other's interpretation. As such, SBC's proposal should be rejected by this Commission.

In addition, SBC's unilateral interpretations of the numerous cases incorporated into its language are self-serving and seek to automatically impose into the agreement conclusions on matters that are still pending and open to interpretation. A concise change in law provision is more than adequate and appropriate to maintain the Parties' compliance with the ever changing landscape of telecommunications law. As such, the Commission should reject SBC's language in GTC Appendix Sections 21.1, 21.2, 21.3 and 21.4.

[167] Mandell Direct, p. 20.

[168] Mandell Direct, p. 25.

ISSUE GTC 11

LEVEL 3 POSITION

SBC's language in section 29.1 attempts to limit Level 3's ability to assign or otherwise transfer this Agreement to a Level 3 affiliate, if that affiliate already has an existing interconnection agreement with SBC. Level 3 understands SBC's objection to this sort of assignment is based solely on SBC's asserted limitations in its billing systems.[169] This is not an appropriate balancing of the Parties' interests to allow supposed inflexible billing system processes to inhibit Level 3 from implementing strategic business plans and practices.

Further, SBC's proposed limitation on Level 3, from assigning the Agreement, does not reciprocally limit SBC in its ability to assign the agreement to another SBC Affiliate with whom Level 3 may have an agreement. For these reasons, SBC's proposals in Section 29.1 are unreasonable and should be rejected by this Commission.

VIII. ISSUES IN THE PHYSICAL AND VIRTUAL COLLOCATION APPENDICES

Issue PC/VC 1

LEVEL 3 POSITION

Level 3 should not be denied access to sources of Applicable Law and favorable terms in SBC's state and federal tariffs, as SBC proposes, because the Agreement does not specifically list them.

SBC's language states "[t]his Appendix contains the ***sole and exclusive*** terms and conditions pursuant to which LEVEL 3 will obtain physical collocation from SBC-13STATE."[170] Since the telecommunications industry is constantly evolving, as new developments take place, SBC modifies its retail and wholesale service offerings by changing its state and federal tariffs, including its federal tariffs that offer collocation services (see e.g. SBC Tariff F.C.C. No. 2.). Level 3 should not be precluded from taking advantage of SBC's voluntary offerings that are made available to other companies, or even offerings that are made available through tariffs because of the applicable law.[171]

SBC equates Level 3's language with regard to SBC tariffs with allowing Level 3 to "pick and choose" most favorable collocation rates terms and conditions.[172] In fact, SBC witness Ms. Fuentes-Niziolek goes into a misplaced discussion of the FCC's recent "All-or-Nothing" Rule and how such rule requires a CLEC that adopts another CLEC's interconnection agreement to adopt all the rates, terms and conditions of that agreement.[173] SBC is wrong in its analogy.

[169] Mandell Direct, p. 26.

[170] See PC Issue 1, Section 4.4 of SBC's proposed PC Appendix.

[171] Mandell Direct, p. 30.

[172] Fuentes-Niziolek Direct, p. 4-5.

[173] Fuentes-Niziolek Direct, pp. 4-5.

Importantly, the new "All-or-Nothing" rule relates to adoption of entire interconnection agreements between SBC and another CLEC and has nothing to do with acknowledging the existence of SBC's state and federal tariffs and the impact of modifications that may be made to such tariffs. Should there be a dispute between the Parties as to the impact of modifications of SBC's tariffs on the Agreement, the General Terms and Conditions contain adequate procedures for resolving such disputes.

The Agreement should acknowledge that there may be legislative, administrative or court proceedings (i.e., "Applicable Law" as defined in the Agreement) that will impact the Agreement, including the collocation methods by which the two Parties interconnect, in addition to those specified in the collocation appendices.[174] If the Parties fail to reference "Applicable Law" in the Agreement, it could result in a possible waiver of the Parties' rights pursuant to such legislative, administrative or court proceedings[175]

Level 3's language in Virtual Collocation Appendix Sections 1.2 and 1.10 and Physical Collocation Appendix Sections 4.4, 7.3 and 7.3.3 will allow the Parties to incorporate any methods of collocation captured in such modifications to Applicable Law. [176]

Issue PC/VC 2

LEVEL 3 POSITION

SBC proposes language deems it the arbiter of what equipment, if any, Level 3 is able to collocate in its cage. SBC's language gives SBC the authority to prevent Level 3 from collocating equipment "in the event that SBC-13STATE believes that collocated equipment is not necessary for interconnection or access to UNEs or determines that Level 3's equipment does not meet the minimum safety standards". In other words, SBC wants unilateral authority to prevent Level 3 from collocating its equipment.

Rather than making Level 3 subject to the whims of SBC to determine "that the equipment that Level 3 seeks to collocate does not meet the applicable safety standards or is not necessary for interconnection or access to UNEs" as Ms. Fuentes-Niziolek asserts, Level 3 looks to the binding legal guidance presented by the FCC. It is clear upon examination of that FCC guidance that SBC's proposals herein are contrary to the law and sound policy. According to FCC rules, if an ILEC "objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, ***the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements*** under the standards set forth in paragraph (b) of this section."[177] As such, the FCC rules make clear that SBC may not ***preemptively*** deny collocation as asserted in SBC's language and the testimony of its witness. Rather, SBC must prove to the Commission that the equipment is not necessary.

[174] Mandell Direct, p. 29.

[175] Mandell Direct, p. 29.

[176] Mandell Direct, p. 29.

[177] 47 U.S.C. §51.323(c).

In addition, 47 C.F.R.51.323(c) states, in part, that an ILEC "may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment." SBC's language is not only preemptive, but also creates ambiguity with respect to the proper level of safety standards.[178]

In fact, the FCC has rejected the ILEC argument (joined by SBC) "that an incumbent LEC must be allowed to preclude collocation of any equipment that includes one or more functionalities whose deployment is 'unnecessary' for interconnection or access to unbundled network elements."[179] The FCC held that SBC's argument was "unreasonably narrow and disconnected from the statutory purposes."[180]

In spite of this clear and unquestionable FCC precedent, SBC's proposals are inconsistent with the FCC rules, and have been unambiguously rejected by the FCC in the *FCC Collocation Order on Remand*. On the other hand, Level 3's position strikes a balance between Level 3's right to timely collocate its equipment and SBC's right to require that the equipment collocated in its premises locations meets minimum safety standards.[181]

Such unilateral authority placed in the hands of SBC threatens to impede the very manner in which Level 3 is able to collocate its facilities, especially in light of SBC's proposals to force Level 3 to interconnect at every tandem in the LATA. SBC should not be allowed to preemptively block the placement of Level 3's collocation equipment in SBC's premises locations, until it is determined that the equipment is acceptable for placement in Level 3's collocation space. If SBC is granted unilateral authority to determine what equipment is and is not acceptable for Level 3 to collocate in its collocation space, there is an incentive for SBC to prohibit Level 3 from collocating certain equipment in order to inhibit Level 3 from fulfilling its obligations to its customers.[182]

As such, the Commission should reject SBC's language in Physical Collocation Appendix Section 6.13 and Virtual Collocation Appendix Section 1.10.10, and adopt Level 3's language that tracks the FCC's regulations and orders.

Issue PC 3

LEVEL 3 POSITION

Level 3 asserts that the Physical Collocation Appendix should not include billing dispute provisions separate and aside from the billing dispute provisions already found in the General

[178] Bilderback Direct, pp. 6.

[179] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, ¶41 (Aug. 8, 2001) ("*FCC Collocation Order on Remand"*).

[180] *FCC Collocation Order on Remand*, ¶ 41.

[181] Bilderback Direct, p. 7.

[182] Bilderback Direct, p. 5.

Terms and Conditions. From Level 3's perspective, the billing dispute provisions already incorporated into the General Terms and Conditions fully address any potential disputes between the Parties.[183] Such a result will complicate the business relationship between the Parties and cause ambiguity as to what provisions apply to what dispute scenarios.

SBC claims that separate billing dispute resolution provisions are necessary for collocation, because collocation, unlike other SBC offerings, deals with "actual real estate".[184] This is not sufficient justification (any leasing of UNEs involves use of a physical asset) for deviating from the dispute resolution provisions that are set forth in the General Terms and Conditions, which by their very terms, apply to the Agreement as a whole.

In addition to the confusion resulting from creating a new and additional dispute resolution framework applicable to just a single form of service (billing strictly for collocation), there are numerous serious concerns that this Commission should have with SBC's proposed terms. First, SBC attempts to remove certain types of disputes involving physical collocation (described in Section 29.7.1) from this Commission's jurisdiction by requiring mandatory arbitration.[185] Second, SBC seeks to require Level 3 to separately deposit disputed amounts involving physical collocation into an escrow account. As stated by Ms. Mandell, "[i]f Level 3 fails to comply with the complex set of rules specific to the physical location escrow account …then Level 3 suffers an 'irrevocable and full waiver of its right to dispute the subject charges'".[186] This unjustified and unreasonable demand places Level 3 behind the eight ball whenever a potential collocation billing problem arises. Equally unreasonable is SBC's proposal that disputed amounts placed in escrow be subject to late payment charges.[187] According to SBC's language, if Level 3 places disputed amounts in escrow, Level 3 is obligated to pay late payment charges even if it ultimately wins the dispute. Regardless of whether Level 3 would be credited the escrow amounts and late payments upon resolution of a dispute in Level 3's favor, Level 3 would still have to unreasonably allocate much-needed resources into an escrow account.

Third, SBC's proposal that Level 3 notify SBC of its objection to a bill within 30 days of receipt is unreasonable, and results in forcing Level 3 to waive its rights to the otherwise available statutes of limitations for either breach of contract or a violation of the applicable telecommunications laws.[188] As stated by Ms. Mandell, Level 3 may not have identified a billing error within time frame proposed by SBC. CLEC bills, as opposed to residential bills, are long and complex and take significant time and company resources to review and reconcile.[189] As a result, it may be months before a billing error is recognized. However, SBC's language precludes Level 3 from seeking redress in either informal disputes or formal disputes before this

[183] Mandell Direct, p. 35.

[184] Fuentes-Niziolek Direct, p. 10.

[185] Mandell Direct, p. 35.

[186] Mandell Direct, p. 35-36.

[187] Mandell Direct, pp. 35-36.

[188] Mandell Direct, p. 36.

[189] Mandell Direct, p. 36.

Commission or the courts. SBC claims that Level 3 has misunderstood its proposal and that Level 3 does not need to notify SBC of its dispute until 29 days following the Bill Due Date.[190] SBC argues this provides Level 3 an additional 29 days from the date Level 3 must pay its bills.[191] Even if SBC's assertions are true, it would still result in forcing Level 3 to waive the otherwise available statutes of limitations for either breach of contract or a violation of the applicable telecommunications laws.

For these reasons, multiple billing dispute provisions should not be allowed throughout the Agreement and the Appendices. Rather, the billing dispute resolution provisions already established in the General Terms and Conditions should apply to collocation as it does to all other types of billing disputes. As such, the Commission should reject SBC's language and adopt Level 3's proposals in Physical Collocation Appendix Sections 29.2, 29.2.1, 29.3., 29.3.1, 29.3.1.1, 29.3.1.2, 29.3.1.3, 29.3.1.4, 29.3.1.5, 29.3.2, 29.4, 29.4.1, 29.5, 29.5.1, 29.6, 29.6.1, 29.7, 29.7.1, 29.7.2, 29.7.3, 29.8, 29.8.1, 29.8.2, 29.8.3, 29.9, 29.9.1, 29.9.1.1 and 29.10.

IX. ISSUES IN THE COORDINATED HOT CUT APPENDIX

CHC Issue 1

LEVEL 3 POSITION

A coordinated hot cut ("CHC") is used when a CLEC needs to cut a customer to another loop within a very specific timeframe. A CHC varies from a batch hot cut in that the cut occurs at a specific time on a specific day to minimize the time that a customer might be out of service.[192]

Level 3 believes that CHC services should be priced at Commission-approved TELRIC rates. In contrast, SBC proposed that the Commission adopt a nebulous, quasi-formula that results in inconsistent charges varying by day, carrier and lines, instead of merely adopting the prices ultimately approved by the Commission.[193]

In the Joint DPL submitted to this Commission in August 2004, SBC claims that its costs of performing a hot cut are "covered by TELRIC-based rates as required for the provision of UNE elements."[194] However, SBC claims that it "allows CLECs to request that SBC provide optional coordination of the hot cut activity" that is not part of the actual provisioning of the CHC UNE. To SBC, rates for this "optional" service are based on a time sensitive basis.[195] But from SBC's language in Section 3 and the corresponding rate sheets, SBC's rationale for its rates is unclear. It appears that SBC's rates for the "optional" service are *not* forward-looking, or

[190] Fuentes- Niziolek Direct, p. 10-11.

[191] Fuentes- Niziolek Direct, p. 10-11.

[192] Gates Direct, p. 66.

[193] Gates Direct, p. 67.

[194] See, SBC Position/Support section of the CHC DPL submitted in August, 2004.

[195] Gates Direct, p. 66.

TELRIC-based, but instead are based on several time-sensitive variables. As such, Level 3 cannot fully assess SBC's proposal and corresponding rates, especially since SBC did not provide any justification for those rates. From SBC's statements in the Joint DPL, SBC's rate proposal does not comply with the FCC's TELRIC standard.[196]

The Commission should hold SBC to a strict interpretation of the FCC's TELRIC rules in setting coordinated hot cut rates. The Commission must ensure that SBC's underlying TELRIC costs, and its resultant rates, comply with the FCC's forward looking, most efficient technology standards. In doing so, the Commission should ignore the significant amounts of manual intervention typically inherent in SBC's processes, for which SBC will undoubtedly claim it must recover its costs. Instead, the Commission must set rates based on efficient systems and processes built around existing technologies capable of providing a more efficient, least cost hot cut process.[197]

Level 3's position is far more reasonable and straightforward – that SBC's CHC service must be based upon its forward-looking, TELRIC-based rates. Therefore, the Commission should adopt Level 3's language and reject SBC's language in Section 3.1, 3.2, 3.2.1, 3.2.2, 3.2.3, 3.2.4 and 3.2.5 of the CHC Appendix.

X. ISSUES WITH OET APPENDIX

OET Issue 1

LEVEL 3 POSITION

As a threshold matter, Level 3 believes that SBC's language is confusing, unnecessary and duplicative of the terms contained in the ITR and NIM Appendices controlling the manner in which the two networks are interconnected. SBC's real interest in this appendix is its desire to assure that SBC will not be required to provide UNEs or collocation outside of their serving area. Clearly, the Act and FCC regulations to do not obligate SBC to provide UNEs and collocation outside of their serving area, even if SBC were to become a CLEC in such area. There is no need for a separate OET appendix to make this simple issue clear.

The real issue with the OET Appendix is how to handle interconnection of traffic. From a networking perspective, the evidence is clear that traffic to and from CLECs and ICOs will be delivered over the same trunks whether the destination is inside or outside an SBC exchange area when the CLE or ICO switches serve the entire area.[198] Thus, switching systems cannot distinguish OET from non-OET calls, since CLECs and ICOs have customers both within and without the SBC serving area. The evidence also demonstrates that OET traffic should not be treated different than any other traffic interconnecting at established POIs and combined on the same trunk groups with other traffic between the SBC network and the Level 3 network. From Level 3's perspective, this local traffic issue is already subsumed in the NIM and ITR Appendices, and does not require the introduction of another appendix.

[196] Gates Direct, pp. 66.

[197] Gates Direct, pp. 67.

[198] Wilson Direct, p. 47.

SBC's only other issue in the OET section is their desire to assure that SBC will not be required to provide UNEs or collocation outside of their serving area. Clearly, the Act and FCC regulations to do not obligate SBC to provide UNEs and collocation outside of their serving area, even if SBC were to become a CLEC in such area. There is no need for a separate OET appendix to make this simple issue clear. Level 3 would have no problem in adding a simple statement to this effect in the General Terms and Conditions section of the agreement.

In short, there is no technical or networking need for separate trunk groups to the SBC tandem switches for OET traffic.[199] SBC's proposals should be rejected in their entirety as unreasonable, and factually unsupported by the record. The Commission should discard SBC's OET Appendix in its entirety as duplicative and confusing.

This OET issue is covered by existing law. However, SBC's language limits the applicability of the terms of the OET Appendix to just those areas governed by the ILEC territory. Level 3 is concerned that, in the event SBC sells off its ILEC operations in a particular service territory or subset of that territory (thus making the area no longer SBC's ILEC territory), Level 3 may be precluded from providing service in that newly disposed territory because Level 3 would not have an ICA with the new ILEC entity.

In the alternative, should the Commission not agree that OET Traffic be excluded from the Agreement, Level 3 proposes that the agreement contain terms defining the OET obligations according to Section 251(h) of the Act, which requiring that OET obligations service sale of an exchange. Specifically, Section 251(h) of the Act defines an ILEC as the local exchange carrier that is a person or entity that, on or after February 6, 1996, became a successor or assign of an ILEC.[200] Under Level 3's proposal, the terms of the OET obligations apply regardless of ownership of an exchange changes. Thus, continuity of service can be assured to Level 3's customers in the affected exchanges.

The Commission should reject SBC's language in OET Appendix Section 2.1. However, in the alternative, Level 3 provides reasonable language to be included should the Commission disagree with the exclusion of OET Traffic.

OET Issue 2

LEVEL 3 POSITION

This OET issue is covered by existing law. However, in addition to its unbundling obligations imposed pursuant to Section 251 of the Act, SBC also faces unbundling requirements from a number of other sources. Thus, it is improper to artificially limit the applicable law imposing these obligations, as SBC attempts to do in its language.

For instance, as explained in the arguments related to UNE Issue 1 above, SBC is obligated under Section 271 (and the related 271 orders adopted by the Commission and the

[199] Wilson Direct, p. 48.

[200] Section 251(h)(1)(A)(ii).

FCC) and relevant state laws to unbundled network elements. In particular, the Section 251(c) obligations are referenced and incorporated as obligations of the BOCs under checklist item number two and at least four of the other checklist items require BOCs to provide competitors with "unbundled" access to specific network elements.[201]

In its *TRO Order*, the FCC held that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements ***that does not hinge on whether those elements are included among those subject to section 251(c)(3)'s unbundling requirements***.[202] Accordingly, as the FCC reiterated in the very recent *SBC Broadband Forbearance Order* "even if [the FCC] concluded that requesting telecommunications carriers are not "impaired" without access to one of those elements under section 251, ***section 271 would still require the BOC to provide access***."[203] The USTA II Order affirmed the Commission's conclusions related to the section 271 obligations.[204]

In addition to Section 271 unbundling requirements, SBC is also obligated to unbundled pursuant to state statutes and orders, as well as to collocate pursuant to its tariff and relevant state laws and order. However, SBC's language attempts to dispose of these independent legal obligations by limiting the agreement to referencing just Section 251 of the Act. This is improper, and an affront to this Commission's jurisdiction.

For this reason, the Commission should adopt Level 3's language in OET Appendix Section 2.3 as more consistent with the reality of the law with respect to unbundling obligations.

OET Issue 3

LEVEL 3 POSITION

The OET language at issue is a duplication of the language contained in ITR Appendix Paragraph 5.4.8, 10.1.1, and 10.3.1. Level 3 does not believe it appropriate in this agreement to limit itself to the specifically listed interface or technology, as SBC would have it do. From Level 3's perspective, the agreement should be flexible enough to allow for adoption of certain other technologies upon agreement of both the parties or applicable law. However, SBC's language in OET Appendix Section 3.1 mandates that Level 3 "shall pass all SS7 signaling information including, without limitation, charge number, and originating line information ("OLI")." SBC's proposal goes on to require CPN, TNS, CIC and CIC/OZZ data when needed. While this may or may not be appropriate based upon the current technology, there is no need to unnecessarily limit the parties' options by adopting language that specifically precludes the consideration of any other format or technology. The Ordering and Billing Forum (OBF) has not yet made recommendations for the content and formats that should be used for IP calls or for traffic that is routed by softswitches. This is one reason that it would be prudent to require some

[201] 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi), (x).

[202] *Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, *corrected by Triennial Review Errata*, 19 FCC Rcd at 19022, paras. 30-33.

[203] *In the matter of SBC Communications Inc's Petition for Forbearance Under 47 U.S.C. § 160(c)*, FCC Docket No. 04-254, WC Docket No. 03-235, ¶ 7 (rel. October 27, 2004); citing to *Triennial Review Order* at 17384, ¶ 653.

[204] *Id*. at 588-90.

flexibility between the parties. As such, the Commission should reject SBC's language in OET Appendix Section 3.1, and allow for flexibility in light of advanced technology or other mutual agreement between the parties.

OET Issue 4

LEVEL 3 POSITION

The contract language at issue in OET 4 is the same or similar to language in ITR sections 3.2, 4.2, 4.4, 4.4.1, 5.2 and its subsections and GT&C 2.12.1 and 2.12.2. As in those sections, the Parties have agreed to the appropriate Performance Measures that should govern service quality under this Agreement, and submitted those terms in this proceeding for approval. In fact, there is not a single dispute between the Parties related to the Performance Measurements Appendix, as it is presented with no requests for any arbitration of its terms. This leaves Level 3 questioning why SBC believes it appropriate to burden the Agreement with additional service quality terms. In addition to the Performance Measurements Appendix, Level 3 notes that certain of the Measurements may also be governed by specific orders of the Commission, as well as FCC regulations, all of which SBC's language ignores. SBC's language amounts to nothing more than an attempt to force Level 3 to waive its rights and benefits under the Performance Measurement Appendix, the FCC regulations and the Commission Orders. As such, Level 3 urges this Commission to reject SBC's language in OET Appendix Section 3.3 and 3.4.

SBC Issue 4(b). Level 3 does not take issue with the need to maintain the technical integrity of the network. However, Level 3 is concerned over SBC's ability to negatively impact the reliability of the services provided to Level 3's customers over these switched-network rerouting or protective control actions. SBC's language ignores these terms and regulations and, instead, applies such vague terms as "acceptable service levels", "little or no delay", "when required to protect the public switched network from congestion" and "large or focused temporary increases in call volumes". These vague and ambiguous terms can only lead to confusion, disputes and litigation in the future, and seem to be a waiver of the governing terms of the Performance Measurements Appendix.

As stated with OET Issue 4(a) above, Level 3 believes it is appropriate to utilize the terms of the Performance Measurements Appendix and the other FCC and state regulations. Those agreed-upon terms and other regulations provide the clarity and guidance required to address the technical integrity issues that SBC language makes unclear. As such, the Commission should reject SBC's language in OET Appendix Section 3.3, 3.4, 3.5 and 3.6.

OET Issue 4(c)

LEVEL 3 POSITION

The language at issue in this paragraph is the same as language in ITR 10.3.1. SBC proposes language in OET Section 3.6 that mandates that the Parties must cooperate and share pre-planning information regarding cross-network call-ins expected to generate large of focused temporary increases in call volumes. Level 3 acknowledges the obvious need for the two parties to cooperate in the interconnection process. However, the approach SBC suggests is based on language that is far too broad and vague to provide any clarity as to when the terms are activated.

SBC presents no attempt to define what level of call-ins qualify as "large and focused", nor what is meant by "sharing pre-planning information". This inherent lack of detail leaves both Level 3 and SBC open to allegation of abuse and failure to cooperate with the terms of SBC's proposals in OET Appendix Section 3.6 – even when the party has a good faith belief that its actions do not meet the ambiguous terms of that Section. This Commission should reject SBC's proposals in OET Appendix Section 3.6.

OET Issue 5(a

LEVEL 3 POSITION

This issue was initially addressed in NIM Issue 2 above (ITR Appendix 4.2), to which the Parties were able to reach an agreement allowing Level 3 to locate a single POI in each LATA. This OET Issue 5(a) should be determined in coordination with the agreement therein.

OET Issue 5(b)

LEVEL 3 POSITION

SBC's language again applies the "Section 251(b)(5) Traffic", which has never been defined in any FCC order or regulation to Level 3's knowledge. SBC's proposed classification of the newly-crafted and amorphous "Section 251(b)(5) Traffic" mischaracterizes the types of traffic that is actually exchanged between SBC and Level 3.

Consistent with the arguments found in ITR Issues 1, and 19. Level 3 proposes that the terms of the agreement characterize the traffic types follow the definitions as set forth in the Act – i.e., "Telephone Traffic, ISP-Bound Traffic and IP-Enabled Services". These terms are easily defined based on existing law and provide clarity as to the scope of the language, thus limiting the opportunity for disputes in the future. As such, the Commission should reject SBC's use of the newly-crafted "Section 251(b)(5) Traffic, and instead accept Level 3's language in OET Appendix Section 4.1 utilizing clear and defined terms.

OET Issue 5(c)

LEVEL 3 POSITION

SBC asks this Commission to adopt language related to "OET Traffic". Initially, the Commission should recognize that such a term is, before now, an unknown term in the telecommunications industry. In fact, the evidence indicates that Level 3 networking witness Mr. Wilson testified that in his 25 years of experience in the telecommunications industry, he has never heard of the term Out of Exchange, and has never had need to know when traffic is out of exchange traffic.[205] Mr. Wilson also notes that the term is not found in Newton's Telecom Dictionary or in the Telecordia "Notes on the Network", two widely regarded publications in the industry.[206]

[205] Wilson Direct, p. 47.

[206] Wilson Direct, p. 47.

From a networking perspective, the evidence is clear that traffic to and from CLECs and ICOs will be delivered over the same trunks whether the destination is inside or outside an SBC exchange area when the CLE or ICO switches serve the entire area.[207] In short, there is no technical or networking need for separate trunk groups to the SBC tandem switches for OET traffic.[208] SBC's proposals should be rejected in their entirety as unreasonable, and factually unsupported by the record.

Section 251(c)(2) mandates that SBC must provide interconnection with Level 3 for the exchange of Telecommunications Traffic, which is precisely what Level 3 proposes to include in OET Appendix Section 4.1. In light of the fact that Level 3's language is not only consistent with, but extracted from Section 251(c)(2), then the Commission should adopt Level 3's language in OET Appendix Section 4.1.

OET Issue 5(d, e)

LEVEL 3 POSITION

Section 251(a)(1) of the Act requires every telecommunications carrier, including SBC, to interconnect directly or indirectly with every other telecommunications carrier. As explained in the ITR Issues above, Transit Traffic constitutes such indirect interconnection. Further, it is far more efficient use of the network (and the resources of the parties) to utilize the currently existing interconnection facilities between SBC and the numerous RLEC, ILEC and CLEC carriers that operate in the service area. Forcing Level 3 to build out additional interconnection trunks to each carrier to whom traffic may be carried is unwarranted, costly and inefficient. Level 3 also notes that SBC is fully reimbursed for all expenses associated with Transit Traffic, including a reasonable profit. Thus, SBC cannot reasonably claim that using the interconnection facilities for Transit Traffic is a drain on its resources. In light of these facts, and the arguments contained in ITR Issue 1 above, the Commission should adopt Level 3's rationale language in OET Appendix Section 4.1.

OET Issue 6

LEVEL 3 POSITION

Level 3's language in OET Appendix Section 4.2 that states the Parties agree to reference the interconnection terms and conditions found in the ITR Appendix following arbitration and before submitting a final agreement to the Commission for approval. Level 3's language will provide the Parties with clarity on the duties and roles of the Parties in that interim period. This common-sense approach Level 3 proposes will alleviate any confusion on the appropriate interconnection terms governing. This is especially important in light of the fact that Level 3's current Agreement, which may contain terms different from the terms ultimately adopted in the Commission's deliberations herein, will be replaced with the Agreement stemming from this arbitration.

[207] Wilson Direct, p. 47.

[208] Wilson Direct, p. 48.

With respect to SBC's attempt to force Level 3 to build out trunks to each tandem in the LATA, such attempt is directly in conflict with federal law. This matter is detailed above in ITR Issue 1, and Level 3 urges the Commission to adopt terms herein that are consistent with its deliberations in that issue above. As such, the Commission should reject SBC's language and adopt Level 3's language in OET Appendix Section 4.2. Level 3 notes that this issue has been settled in ITR, but the settlement has not yet been translated into a settlement of the mirror OET issue.

OET Issue 7

LEVEL 3 POSITION

This issue is the same as OET Issue 6 above, and should be decided consistent with the Commission's findings therein. Level 3 urges the Commission to adopt its language in OET Appendix Section 4.3.

OET Issue 8(a)

LEVEL 3 POSITION

This issue is the same as OET Issue 6 above, and should be decided consistent with the Commission's findings therein. The Commission should adopt Level 3's language in OET Appendix Section 4.9.

OET Issue 8(b)

LEVEL 3 POSITION

Under the unambiguous mandates of Section 251(c)(2)(B), SBC must provide Level 3 with interconnection "at any technically feasible point within its network." As detailed in ITR Issue 1 above, Level 3 has the right to choose where and how the interconnection will take place. The ILEC, in turn, must provide the facilities and equipment for interconnection at that point. Level 3's language in OET Appendix Section 4.9 is consistent with these legal requirements. SBC's language, however, again attempts to force Level 3 into interconnecting a trunk group to SBC's tandem or end offices, in violation of the requirements of Section 251(c)(2)(B). For the reasons detailed in ITR Issue 1 above, the Commission should adopt Level 3's language in OET Appendix Section 4.9.

OET Issue 9

LEVEL 3 POSITION

This issue is the same as addressed in Level 3 OET Issue 5(b) above. For the same reasons detailed therein, the Commission should adopt Level 3's language in OET Appendix Section 5.1.

OET Issue 10

LEVEL 3 POSITION

The issues here relate to the use of the interconnection facilities for exchange of Transit Traffic. For the reasons detailed in ITR Issues 1 and 2, Level 3 OET Issue 5(d), Level 3 OET Issue 5(b) and SBC OET Issue 5(e) above, the Commission should adopt the language proffered by Level 3 in OET Appendix Section 6.0, 6.1, 6.2, and 6.3.

OET Issue 11

LEVEL 3 POSITION

This issue also addresses SBC's proposed use of the undefined and nebulous term "Section 251(b)(5) Traffic". As detailed above with regard to Level 3 OET Issue 5(b), Level 3's proposed use of the terms "Telecommunications Traffic and IP-Enabled Traffic" follow the definitions set forth in the Act and FCC orders, and should be adopted in the Agreement. For the same reasons as detailed in OET Issue 5(b) above, the Commission should adopt Level 3's language in OET Appendix Section 9.0, 9.1, 9.3 and 9.7.

OET Issues 11(b) and 12

LEVEL 3 POSITION

SBC's proposes language in OET Appendix Section 9.1 and 9.2 that requires Level 3 to use a two-way direct final trunk group to exchange traffic with SBC and that the associated traffic from each end office will not alternate route. However, SBC's language presupposes that telecommunications and IP-Enabled Traffic will need to alternate route. Level 3 disagrees with the position, thus obviating the need to include SBC's language. As such, the Commission should reject SBC's language in OET Appendix Section 9.1 attempting to impose two-way "direct final" trunks groups.

XI. ISSUES WITH SS7 APPENDIX

SS7 Issue 1

LEVEL 3 POSITION

Currently, Level 3 uses a third-party provider for SS7 services. However, Level 3 does not want to foreclose its opportunity to build its own SS7 network in order to avoid the additional expenses of using a third party. When Level 3 builds its own SS7 network, it will need to interconnect that network with SBC's SS7 network. The Parties agree that a Bill and Keep arrangement should govern the exchange of SS7 messages for non-toll calls in the event that Level 3 opts to acts as its own SS7 service provider. The disagreement comes as to whether Level 3 can carry all of its SS7 messages, including messages for toll calls, over a single set of Quad Links[209]. SBC's proposal requires Level 3 to establish a duplicate set of Quad Links to carry SS7 messages for toll traffic. Just as with the Interconnection Trunking Facilities issues discussed above, SBC's concerns again relate to preserving their access charges by tracking and billing for access traffic. Level 3 proposes that the Bill and Keep regime apply to each Party's CLEC calls. To the extent that the SS7 Quad Links are used for both local and toll traffic, then

[209] Quad Links are the data connections between SS7 networks that carry the messages necessary for call setup and other functions essential for exchanging traffic.

the proper access charges owed will be calculated using the same Percent of Local Usage ("PLU") and Percent Interstate Usage (PIU) allocation factors that are calculated to accurately assess access charges when traffic is combined on single trunk groups. This makes perfect sense as the SS7 messages correspond to the traffic that is carried on the interconnection trunks.

Requiring Level 3 to build duplicate sets of Quad Links to each SS7 switch wastes scarce resources in both the SBC and Level 3 SS7 networks. There is no technical reason to force Level 3 to construct duplicate sets of Quad Links and then segregate SS7 messages based on the jurisdiction of the traffic that the messages represent. Likewise, there is no technical reason that proper billing for SS7 messages can not be handled using the same PLU and PIU factors developed for efficient billing of the actual call traffic. Level 3's language clarifies that requirement, is consistent with the law and tradition, and the Commission should adopt its language in SS7 Appendix Section 2.1.1.

XII. ISSUES IN THE RECORDING APPENDIX

REC Issue 1

LEVEL 3 POSITION

SBC proposes that when Level 3 is the Recording Company, Level 3 will provide its recorded billable message detail and access usage record detail data to SBC under the terms and conditions of the Appendix.[210] The terms and conditions of the Appendix require that recorded billable message detail be provided as set forth in the MECAB document, the format historically used for access records exchanged between ILECs and IXCs. However, the MECAB/MECOD format is only a recommendation, not a standard and need not be the exclusive billing and recording language. Level 3 argues that there is no need to artificially limit the billing/recording language to exclusively mandate that the MECAB/MECOB format is the only acceptable format. Level 3 proposes that in light of anticipated reforms to the access charge system,[211] the Parties include language that permits them to discuss mutually agreeable methods for exchanging the same data, but in formats or by means that correspond with the anticipated reforms.[212] The MECAB/MECOD format is a dated format that has been used for decades, and may well be irrelevant after the upcoming reforms to the access charge system.[213] In addition, guidelines for IP calls are still under development and may change the way that the billing for such calls are handled between the companies.

Level 3 does not seek to incorporate a non-industry standard or guideline in the Agreement, but instead seeks the *option* to agree with SBC on another format in anticipation of major changes in the current access charge regime and formatting for IP calls. In other words, Level 3 only asks that the Agreement give the Parties the flexibility to agree to another method

[210] Wilson Direct, p. 37.

[211] The Federal Communications Commission is currently considering issues that will likely affect access charges, such as a number of Voice over Internet Protocol Petitions and the August 16, 2004 Intercarrier Compensation Forum proposal.

[212] Wilson Direct, pp. 37.

[213] Wilson Direct, pp. 37.

of exchanging billing records when such formats become available due to changes in industry guidelines. As such, Level 3's position is reasonable and the Commission should adopt Level 3's language in Recording Appendix Section 3.13.

REC Issue 2

LEVEL 3 POSITION

SBC's language requires the Parties to exchange Access Usage Records according to the guidelines and specifications contained in the MECAB document. However, as discussed in REC Issue-1 above, Level 3 does not believe that the companies should be locked into the historical Access Usage Records ("AUR") format. The AUR format was developed by ILECs and IXCs years ago, and is more appropriate for the huge volumes of circuit-based access traffic generated by IXCs.[214] Level 3 can provide the same information, but prefers to explore simpler formats with SBC. There are currently no guidelines available that address formatting of usage records for IP calls. Level 3's language in Recording Appendix Section seeks only to leave open the possibility of utilizing a mutually agreeable alternative format when alternatives are available. As such, the Commission should adopt its language in Recording Appendix Section 4.1.

XIII. ISSUES REGARDING GENERAL TERMS AND CONDITIONS DEFINITIONS

GTC DEF Issue 1

LEVEL 3 POSITION

Level 3's definition is consistent with the historical definition of an Access Tandem, where Access Tandems were only used for passing traffic to IXCs. SBC's definition of access traffic differs, depending on the state involved, and where SBC has embedded traffic distinctions in the definition.[215] For consistency between all of the SBC states for which Level 3 has negotiated, the Commission should adopt a single, consistent definition based upon the historical application of the term. As such, Level 3's definition is from Newton's Telecom Dictionary, 18th edition, a standard reference for telecommunications terminology. Use of a universally accepted definition such as the *Newton's* definition will avoid disputes over traffic types in the definition of switches, and is the most reasonable approach for resolving this issue. Therefore, the Commission should reject SBC's definition of "Access Tandem" and accept Level 3's standard definition of the "Access Tandem."

GTC DEF Issue 2

LEVEL 3 POSITION

Level 3 proposes utilizing the phrase "Call Record" when discussing the Parties' obligations to provide identification data within the call flow of circuit switched traffic, as compared to SBC's proposed use of the CPN data for all traffic. Level 3 believes the "Call Record" reference allows for more flexibility for the Parties to agree to new or different

[214] Wilson Direct, p. 39.

[215] Wilson Direct, p. 49.

technologies in recording. SBC's "CPN" reference limits the Parties to only that form of technology.

Further, the technology does not exist that will allow for "CPN" to be included in the call flow of IP-Enabled Traffic. In practical terms, the issue of whether the "call record" definition should be included will be determined when the Commission addresses Level 3's language in Section 4.5 of the Intercarrier Compensation Appendix. Accordingly, the Commission should adopt Level 3's language regarding "Call Record."

Level 3 GTC DEF Issue 3

LEVEL 3 POSITION

Through its orders and regulations, the FCC has distinguished between Circuit Switched Traffic and IP-Enabled Traffic, finding that IP-Enabled Traffic is not a Circuit-Switched form of traffic. As detailed in the arguments found in the Intercarrier Compensation section of this Brief, there are a number of distinguishing results that differentiate the two types of traffic, not the least of which is that access charges apply to Circuit Switched Traffic and not to information services such as IP-Enabled Traffic.

Level 3 believes that the Agreement should include the definition of Circuit Switched intraLATA Toll Traffic in order to clarify those types of traffic to which access charges would apply. Level 3's language in various parts of the Agreement includes the term Circuit Switched IntraLATA Toll Traffic, so there should be a definition in the agreement to clarify what is meant when the term is used. The FCC, in its most recent ruling on IP-Enabled Traffic provides the definition that Level 3 proposes for Circuit Switched IntraLATA Toll Traffic, and this Commission should adopt Level 3s language in GTC Def Issue 3.

GTC DEF Issue 4

LEVEL 3 POSITION

As detailed above in UNE Issue 1, Level 3 maintains that the Interim Order adopted by the FCC on July 21, 2004 (rel. August 20, 2004) maintains the *status quo* that existed as of June 15, 2004 for the provision of unbundled network elements from SBC to Level 3. As of June 15, 2004, Level 3 was entitled to receive unbundled network elements pursuant to the terms and conditions of the parties' Interconnection Agreement that was approved by the Commission. Level 3 does not wish to waive its rights to obtain unbundled network elements pursuant to those existing terms and conditions.

In addition, the FCC has held that Level 3 and SBC may not arbitrate new agreements until after the FCC adopts permanent rules for the provision of unbundled network elements: "Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either." ¶23. According to the FCC, "such litigation would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible." ¶17. The FCC recognizes that

"the implementation of a new interim approach could lead to further disruption and confusion that would disserve the goals of section 251."

Therefore, the Commission should adopt its position of maintaining the *status quo* and reject SBC's inappropriate attempt to include terms for "Declassification" and "Declassified."

GTC DEF Issue 5

LEVEL 3 POSITION

47 CFR 68.3 defines Demarcation point as follows:

> As used in this part, the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises.

If this definition sounds familiar, that is because it is the exact definition Level 3 proposes for adoption into this Agreement. Consistent with the FCC orders and regulations, including 47 CFR 68.3 above, Level 3 proposes articulating the fact that the Demarcation Point serves as the boundary line between the Parties' network, but also the legal, technical and financial responsibilities. Based upon SBC's own witness testimony, it appears that SBC agrees with the concept that the Demarcation Point (in the case of Level 3, its POI) should serve as the boundary between the Parties networks for legal, technical and financial responsibility for their respective facilities. In fact, SBC admits that the POI is the "financial demarcation point for [the] facilities" and "[e]ach company is responsible for its own facilities on its respective side of the POI" [216], but SBC's interconnection proposals contradict these statements.

Level 3 believes this clarification will remove confusion and possible litigation in the future, as it draws a clear line where the two parties responsibilities end. Therefore, the Commission should adopt Level 3's definition of the term "Demarcation Point" as it is consistent with the FCC rules, and reject SBC's definition.

GTC DEF Issue 6

LEVEL 3 POSITION

SBC's definition of Digital Cross Connect Panel is restricted to T-1 rate lines and circuit packs. Level 3 believes that such an unwarranted restriction is improper, given the fact that Digital Cross Connect Panels are not limited to the T-1 lines, and can be used for T-3 lines as well as fractional T-1 and DS0 lines. As such, Level 3's language is broad enough to cover all types of panels. Level 3's definition is the more accurate and reasonable definition, and should therefore be adopted.[217]

GTC DEF Issue 7

LEVEL 3 POSITION

[216] Albright Direct, p. 18.

[217] Wilson Direct, p. 50.

Level 3 notes that in the FCC's *First Report and Order* in CC Docket No. 97-158, specifically incorporated in SBC's language, the FCC adopts a definition of ISP that stems from the Modified Final Judgment, adopted in 1983. Thus, SBC is asking this Commission to adopt a definition for ISP that is more than 20 years old. Level 3 believes that the Commission should adopt a more flexible definition, which will allow for the incorporation of more recent FCC orders defining the term, and will incorporate upcoming FCC decisions expected related to IP-Enabled Traffic and intercarrier compensation, which may alter or amend the definition yet again. As such, the Commission should adopt Level 3's definition.

GTC DEF Issue 8

LEVEL 3 POSITION

SBC's language in GTC DEF Issue 8 again attempts to place a geographic requirement to define a type of traffic. As discussed in great detail in the issues related to Intercarrier Compensation above, there is no nexus between the physical locale of the calling party and the ISP. Rather, the FCC has held that all ISP-Bound Traffic is interstate in nature and subject to the compensation scheme developed in the *ISP Remand Order*.

Level 3's language clarifies that ISP-Bound Traffic is originated as circuit-switched traffic terminating at an ISP customer of the other Party. This language is consistent with the language used in FCC orders.[218]

For the reasons detailed above and in the Intercarrier Compensation section, this Commission should reject SBC's attempt to inject a requirement that the calling parties be physically located in a certain geographic location in order to make ISP-Bound Traffic. The FCC has never required such a limitation, and neither should this Commission. Therefore, the Commission should adopt Level 3's definition of "ISP-Bound Traffic" as it is consistent with FCC Orders.

GTC DEF Issue 9

LEVEL 3 POSITION

Level 3 takes the position throughout this arbitration that SBC has the obligation under Section 251 to interconnect its network for the exchange of traffic between the parties. SBC also has the obligation to interconnect in a manner that allows Level 3 to exchange traffic in a manner consistent with the manner in which SBC exchanges traffic with itself, its affiliates and any other party. This includes the obligation to allow for Level 3 to exchange all types of traffic over the local interconnection trunks and facilities of SBC, which SBC does for itself and other CLECs. For a detailed explanation of the rationale for this position, please see the ITR Issues section above.

SBC's definition of "Local/Access Tandem Switch" contains embedded traffic distinctions that are unreasonably restrictive, and as such, should not be used. Particularly troubling is that SBC has excluded ISP-Bound Traffic from the traffic types listed – an exclusion

[218] *ISP Remand Order*, FCC 01-0131 (April 27, 2001) at ¶61.

which they have interestingly included in other switch definitions. SBC accomplishes this by limiting the definition with its newly-crafted term "Section 251(b)(5) Traffic", which SBC asserts excludes ISP-Bound Traffic. By inserting in the definitions an aspect applying a "local" requirement, SBC is, in effect, prohibiting Level 3 from exchanging anything other than "local" traffic over these facilities. In contrast, Level 3's more generic definition does not restrict traffic types.

Level 3 believes that the dispute over ISP-Bound Traffic does not belong in the definition of switching. To the extent that the Commission requires the Parties to define the tandem functionality, Level 3's language is taken from Newton's Telecom Dictionary, 15th Edition, a source commonly accepted within the telecommunications industry. Since tandem switches will handle any type of traffic, Level 3's definition, "an intermediate switch or connection between an originating telephone call location and the final destination of the call," is the more rational definition and should be adopted by the Commission.[219]

GTC DEF Issue 10

LEVEL 3 POSITION

As detailed in ITR Issue 11 and GTC DEF Issue 9 above, SBC is attempting throughout its proposed language in this Agreement to limit the use of the interconnection trunks to a subset of traffic types. The Commission's decision on that Issue should be adopted into this definition, as well as other relevant areas of the contract.[220]

GTC DEF Issue 11

LEVEL 3 POSITION

Again, SBC has improperly embedded traffic distinctions in the definition of Local/IntraLATA Tandem Switch. As explained in Level 3 GTC DEF Issue 9 above, the definition would be acceptable to Level 3 if the caveat at the end of the definition, "*for Section 251(b)(5)/IntraLATA Traffic*," was removed. On a technical level, Tandem switches can handle any type of traffic. Therefore, references to specific traffic types do not belong in the definition, especially when those traffic types are based upon SBC's own self-serving interpretations of the law and not a rule or order. Yet again, a troubling problem is SBC's exclusion of ISP-bound traffic, which is included in other switch definitions. The dispute over ISP-bound traffic belongs in other sections of the Agreement, not in the definition of switching.[221] The Commission should reject SBC's attempt to have Level 3 build duplicative facilities to handle different types of traffic, especially since tandem switches can handle all types of traffic.

GTC DEF Issue 12

LEVEL 3 POSITION

[219] Wilson Direct, pp. 51.

[220] Wilson Direct, pp. 51.

[221] Wilson Direct, p. 52.

This issue is virtually identical to the disputes in GTC DEF Issues 9 and 11. Further, a Local Only Tandem Switch can switch toll traffic in either direction without modification if access billing is done using Percent Local Use ("PLU"), as discussed above in IC Issues Introduction above. Although the resolution of the IC Issues above will determine the definition of Local Only Tandem Switch, traffic types should be removed from this definition.[222] The Commission should reject SBC's unreasonable and inefficient attempt to have Level 3 build duplicative facilities to handle different types of traffic.

GTC DEF Issue 13

LEVEL 3 POSITION

Once more, SBC's definition limits local trunk groups to a subset of traffic types, "*Section 251(b)(5)*" traffic. This is an unreasonable restriction on the types of traffic that can be carried over local trunk groups and is not even accurate with respect to the types of traffic that are carried over these trunk groups today. For instance, SBC has excluded ISP-bound traffic from this definition, although the network today carries high volumes of ISP-bound traffic on these trunk groups in the form of dial up Internet service. It would be unreasonable and even impossible for SBC to restrict local trunks in the manner suggested by this definition. The more accurate definition would be "*Local Only Trunk Groups are two-way trunk groups used to carry all forms of PSTN traffic within a LATA*."[223] The Commission should reject SBC's unreasonable and inefficient attempt to have Level 3 build duplicative facilities to handle different types of traffic.

Level 3 GTC DEF Issue 14

LEVEL 3 POSITION

SBC's definition, "*any Local Only, Local/IntraLATA, Local/Access or Access Tandem Switch serving a particular LCA (defined below)*[224]," includes all of the disputed switch definitions that are addressed in the proceeding GTC DEF Issues above. The best solution for all of the issues surrounding the various definitions of tandem switches would be to replace all tandem switch definitions with the term "Tandem Switch" and give it the following definition:

> "Tandem Switch" is defined as a switching machine within the public switched telecommunications network that is used to connect and switch trunk circuits between and among other central office switches.

This definition is the only definition necessary to cover all the types of tandem switches listed by SBC, and would resolve the disputes regarding traffic types that are better dealt with in other sections of the Interconnection Agreement.[225] As such, the Commission should resolve all of the disputes regarding the various tandem types in the GTC Definitions Sections by replacing

[222] Wilson Direct, p. 53.

[223] Wilson Direct, pp. 53-54.

[224] Sic. The parenthetical should say, "(defined above)" since all of the switch types included are alphabetically before this switch type.

[225] Wilson Direct, pp. 54-55.

all of the different tandem switch definitions with the above provided definition, as proposed by Level 3.

GTC DEF Issue 15

LEVEL 3 POSITION

Level 3 proposes a definition that would cover new interconnection methods that may become available in the future under Applicable Law. Failure to specify the existence of "Applicable Law" will result in a possible waiver of both Parties' rights pursuant to those proceedings. It makes no sense to require the Parties to return to arbitration to take advantage of new interconnection methods when they become available. Such a determination would be a drain on the resources of both Parties and the Commission, which will be forced to address any potential arbitrations stemming from these disputes. The reasonable approach, as Level 3 suggests, is to add the text, "*or according to Applicable Law*," to the Agreement as Level 3 proposes, thus eliminating expensive and time-consuming future arbitrations.[226]

Level 3's language incorporates and acknowledges the existence of such events, and clarifies that the Parties are obligated to incorporate any methods of interconnection captured in such modifications. Level 3 does not want the Parties to waive by default their ability to incorporate such changes into this Agreement and to operate pursuant to such new methods.

Therefore, the Commission should adopt Level 3's language which will protect the parties abilities to benefit from new interconnection methods.

GTC DEF Issue 16

LEVEL 3 POSITION

As discussed herein, Out of Exchange is a term invented by SBC. This term cannot be found in Newton's Telecom Dictionary nor in Telecordia "Notes on the Networks", two standard industry publications. Moreover, a Google search on the phrase "Out of Exchange LEC" reveals just 25 entries out of billions of documents on the Internet.[227] All 25 documents are related to SBC contracts. The term and definition are misleading, as one would assume that a LEC who is out of the exchange is not in the exchange. However, SBC's definition actually refers to a CLEC that is in the exchange but has customers outside the exchange. This implies that there is something wrong with a CLEC with coverage in both SBC territory and another adjoining territory. It is normal for a CLEC to provide service in geographic areas that do not follow traditional ILEC and ICO service areas.

In the alternative, Level 3 proposes to define the OET obligation according to Section 251(h) of the Act which would require that OET obligations survive sale of an exchange because they apply regardless of whether ownership of an exchange changes.

[226] Wilson Direct, p. 55.

[227] Wilson Direct, p. 55-56.

SBC's term is a confusing SBC fabrication, and should be stricken from the Agreement. Alternatively, the Commission should accept Level 3's definition of OET since it tracks the requirements Section 251(h) of the Act.

GTC DEF Issue 17

LEVEL 3 POSITION

First, similar to the term "Out of Exchange LEC" discussed in GTC DEF-16 above, the confusing term "Out of Exchange Traffic" has no place in the Agreement. Moreover, SBC's definition excludes some types of traffic from the definition that should be included as part of interconnection. In addition, Level 3 believes that the Agreement should not make any reference to SBC's newly-crafted term "Section 251(b)(5) Traffic", as that phrase is not defined in any FCC order or regulation. Level 3's use of the term "Telecommunications Traffic" is defined in the Act, and should be incorporated into the Agreement.

Second, Level 3 also believes that the Agreement should include reference to "IP-Enabled Traffic". From a practical perspective, SBC's language will result in Level 3 being blocked from exchanging this form of traffic with SBC. SBC has a duty under Section 251 to exchange all forms of traffic with telecommunications carriers, not just selective forms of traffic with certain carriers.

Finally, the definition should also include reference to Transit Traffic. Section 251 mandates that SBC interconnect its network to all other telecommunications carriers, either directly or indirectly. Level 3 believes that includes the exchange of Transit Traffic. Level 3's language in this definition clarifies, consistent with Level 3's position in the ITR Issues section above, that SBC will exchange Transit Traffic that falls under the Out of Exchange Traffic definition.

Therefore, the Commission should reject the inclusion of SBC's terms "Out of Exchange LEC" and "Section 251(b)(5) Traffic", but instead recommends inclusion of "Transit Traffic" and "IP-Enabled Traffic" in the definition of "Out of Exchange Traffic."

GTC DEF Issue 18

LEVEL 3 POSITION

Throughout this Agreement, SBC has attempted to argue in favor of including its self-serving definition of "Section 251(b)(5) Traffic" in the Interconnection Agreement. Level 3 believes that it is unreasonable and misleading to include SBC'S term, which will in all likelihood lead to further needless litigation. Importantly, the proposed term is not defined in any FCC order or regulation. Rather, it is SBC's interpretation of the Act and FCC actions, to which Level 3 neither agrees nor accepts in the Agreement. The Commission should find that it is improper to include a definition of "Section 252(b)(5) Traffic" and thus forego adopting it in the Interconnection Agreement.

GTC DEF Issue 19

LEVEL 3 POSITION

Switched Access refers to the connection between a phone and a long distance carrier's POP when a customer makes a call over regular phone lines. Newton's Telecom Dictionary, 15th Ed. SBC's proposed language is derived directly from its Switched Access Tariff, which governs services to which Level 3 is not purchasing. As discussed in the Intercarrier Compensation issues, Level 3's IP-Enabled Services are not circuit switched services. Rather, they are information services, to which access charges cannot apply. Thus, reference in this agreement to SBC's Switched Access Services Tariff is unnecessary and burdens the Agreement with superfluous tariff language. Level 3's proposed language is consistent with industry standards, and the more reasonable approach for the Commission to adopt.

GTC DEF Issue 20

LEVEL 3 POSITION

Level 3's network is a state-of-the-art, next generation network that does not operate in the same manner as the legacy circuit switched network used by SBC. As such, the legacy terms developed in conjunction with the circuit switched network are outdated and inaccurate. One such outdated concept is the disputed language put forward by SBC. Level 3's "switch" does not connect to SBC's Trunk or Trunk Group. Rather, Level 3's network does via its POI. SBC's attempt to define Trunk based on its historic, legacy terms is inapplicable in the context of the next-generation technology employed by Level 3. As such, the Commission must adopt Level 3''s language referring to network interconnection rather than switch connection as SBC suggests.